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The American
Political Science Review

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FOREIGN SERVICE REORGANIZATION

TRACY LAY

Consul General of the United States

While the general policy governing the nature and the degree of American participation in international affairs may still be regarded as a contested issue, an unequivocal decision has been reached with respect to our foreign service.

Through the enactment of the Rogers Bill, for the reorganization and improvement of the foreign service, a basis has been fixed and a structure provided which are destined to place the foreign representation of the United States in the forefront of diplomatic efficiency. It is not to be concluded that this strengthening and remodeling of the diplomatic machinery is necessarily anticipatory of a forthcoming broader participation in world affairs, or that Congress has acted in the reverse order of logic by perfecting an instrumentality for the conduct of our foreign relations before the nature and the extent of those relations have been finally determined. The need of a strong foreign service is obvious.

The position of the United States has become so commanding that its every act, whether of a positive or of a negative character, is fraught with important consequences to other nations and not infrequently with equally important repercussions at home. A policy of isolation or aloofness, in which the interests of the

world are engaged, is perhaps even more difficult to maintain than a policy of active participation.

The problems which confront the foreign service do not depend for their reality upon the degree of our participation in world affairs; they are inherent in the position which the United States has assumed as an economic, political, and potential, military factor.

In 1919 Secretary Lansing issued the following warning by way of supporting his estimates for increased appropriations:[1]

"The Government now faces a decision with respect to the conduct of our foreign relations. It must reorganize and greatly enlarge the Department of State or there will be a breakdown of the most serious character. The Department will not function on its present basis under the burden of the new load."

This forceful declaration was not inspired by the prospect of active participation in such enterprises as the League of Nations, but was based upon the fact that the United States had become "economically and politically the pivot of the world," and that "prosperity at home is inextricably bound up with the progress of business and politics abroad."

Four years later Secretary Hughes, in his testimony before the House committee on foreign affairs, still further emphasized the increasing importance of international questions as follows:

"We need the very best representation abroad that we can get. Instead of getting out of difficulties, I mean international difficulties, they multiply. Whatever the future may be, the present shows a constant increase of important situations, of new interests, of new problems, to which we must address ourselves with all the ability that we have at our command."[2]

The genesis of the present foreign service is to be traced to the Act of April 5, 1906, which classified consular officers and made possible the issuance by President Roosevelt of the Executive Order of June 27, 1906, placing the consular service on a civil service basis. A similar status was given the diplomatic

[1] Letter to the Secretary of the Treasury, Nov. 10, 1919.
[2] Hearings on H. R. 17, Jan. 14, 1924.

service by President Taft through the Executive Order of November 26, 1909.

Prior to 1906, both the diplomatic service and the consular service were administered on a political basis under what is known as the "spoils system." The reform of that year inaugurated the "merit system," under which admittance to the lower grades was gained through rigid competitive examinations, and subsequent promotions were won through demonstrated ability and efficiency. The results were highly satisfactory. Upon the advent of the Wilson administration in 1913, the system, which rested solely upon the insecure basis of two executive orders, was perpetuated and further strengthened by legislation.[3]

No glaring defects or inadequacies were discernible in the period before the war, when the United States occupied the position of a second-rate power, happy in the security of its isolation and content in the ease of its self-sufficiency. The desirability of suitable foreign representation was obvious, but the necessity for a strong foreign service was not recognized.

The first lesson came as a shock. As Secretary Lansing afterwards admitted:

"The European war came upon the United States in 1914 as a surprise chiefly because its Department of State through inadequate equipment had been unable to gather information and interpret it in a manner which would reveal the hidden purposes of the governments by which hostilities were precipitated. Possibly no blame can be imputed to the Government for this laxity in view of the general confidence in the supremacy of international justice; but today, after the experiences through which we have passed, no reasonable effort must be spared to make a similar surprise impossible in the future."[4]

In post-war conditions many past negligencies and future necessities were revealed. Diplomacy had registered, or contrived, the most enormous failure in history; therefore its processes must be changed; it must be democratized. Erstwhile

[3] Act of February 5, 1915.

[4] Letter to Hon. Stephen G. Porter, Chairman, Committee on Foreign Affairs, H. of R. Jan. 21, 1920.

political questions had become economic in character, and the interdependence of nations was proved; a new type of diplomatist was required. The United States had shifted to a position of financial and general economic preponderance, while other nations were forced to resort to empirical formulae and artificial devices in their efforts to regain and reconstruct; new diplomatic objectives had appeared. The foremost nations began at once to reorganize their foreign establishments.

Taking inventory of our new position, whether it be by examining the rates of taxation, the status of our loans, the distress of agriculture, or the industrial outlook, we find that the search leads us inevitably to a consideration of conditions abroad and the state of our international relations, to the field of our foreign service.

The objects to be achieved through a reorganization of the foreign service were suggested by the very nature of its limitations and incongruities. In the diplomatic service, because of the inadequate rates of compensation, appointments, from the highest ranking ambassador to the lowest ranking secretary, were of necessity made from men possessed of such considerable private fortunes as to be able and willing largely to pay their own way. Apart from other considerations, this had the effect of restricting the field of selection to a small number of candidates among whom ability was not in all cases the controlling requirement.

There being no assurance of eventual promotion to the grade of minister, even after a life-time of meritorious service, the normal, ultimate reward of the career was the position of counselor of embassy or legation, on a salary of four thousand dollars a year. Even in this position of distinction the officer would remain subordinate to a chief of mission who, in most cases, was a political appointee of no diplomatic training or experience.

The work of the diplomatic service being considered as purely political, its officers possessed no wide experience in commercial matters, and yet the economic factor in diplomacy had come to be of almost transcendent importance. Indeed, it is largely the economic urge of a nation that governs its internal political issues and its foreign policy alike.

Salaries in the consular service were more than twice as high as those paid in the diplomatic service, but were still too low for the character of representation required, The consuls general at London and Paris received $12,000 a year. This applied, however, to only two posts, while the range below that grade was from $8,000 downward.

The two services, both under the department of state, were separately administered. There was no interchange of personnel, as this was rendered impracticable by the discrepancies in their respective salary scales. Thus, the consular service had no natural outlet and the career stopped with the grade of consul general. Furthermore, there being no provision for retirement, many of the positions in the upper grades were rapidly becoming clogged by officers who had reached the age of superannuation, thus effectively shutting off the prospect of promotion for the younger and more active men below them. The condition thus created was rapidly draining the service of its good men, many of whom felt themselves forced to yield to the temptations of the business world by accepting the lucrative positions for which their consular training had equipped them.

The work of the consular service is principally commercial as contrasted with the political work of the diplomatic service.[5] Thus in the prevailing system of separate administration, the political and the economic factors, so closely combined in all international questions of today, found themselves uncoördinated and as widely removed from one another as the two careers were separate and distinct.

[5] "Speaking generally, of course, the diplomatic branch of that service is the first line of the country's defense, and the Consular Service is the spearhead of the country's trade." (Hon. John W. Davis, Statement at hearings before the committee on foreign affairs on H. R. 17, December 19, 1922.)

"While many of the duties of diplomatic secretaries differ widely from those of consular officers there is a vast domain of activity in which their functions are essentially the same, as for example, the protection of American interests; the study of foreign conditions; the gathering of information; and the reporting of important events on which the State Department may base its policies and its course of action." (Secretary Hughes in *The Congressional Digest*, January, 1924.)

The first object to be achieved under the reorganization plan was to open the career to talent and ability without regard to the private fortunes of the candidates. The second object was to attract and hold strong men by offering a sufficient reward for meritorious services, by which is meant a reasonable chance of eventual promotion to the grade of minister. The third object was to achieve interchangeability so that a man in either branch of the service could be placed according to his peculiar fitness. There is also involved in the principle of interchangeability a closer coördination of the political and the economic factors aforementioned, in that the commercial experience of the consular service, plus the political experience of the diplomatic service, when combined in a single officer, gives promise of producing a new and broader type of diplomatist. Lastly, there must be a retirement system.

Addressing itself to these aims, the Rogers Bill[6] adopted a new and common salary scale, ranging from $9,000 in class one, downward to $3,000 in class nine, with unclassified, subordinate grades from $3,000 downward. Standing alone, this rate of compensation would not suffice for the purposes mentioned, were there no other benefits accruing. Officers in the foreign service are prohibited by law from engaging in business in the countries in which they are stationed, and therefore have no occasion to supplement their statutory salaries by earnings from other sources. The very nature of their work makes important demands upon their resources in the matter of maintaining an appropriate standard of living and keeping up the representation of their country through continuous personal contact with foreign officials, business men, and other important personages. Even

[6] Introduced by Hon. John Jacob Rogers of Massachusetts as H. R. 17, 1st Sess. 67th Cong; revised in the department of state and reintroduced upon the recommendation of President Harding as H. R. 12543; passed the House of Representatives by a vote of 203 to 27; reported unanimously by the committee on foreign relations of the Senate, but failed of passage in the closing days of the Congress. In the 68th Congress the bill was again introduced as H. R. 17, reported from the committee on foreign affairs, as amended, under the number H. R. 6357; passed the House May 1, 1924 by a vote of 134 to 27; passed the Senate by unanimous consent May 15, 1924; approved May 24, 1924.

the amenities due the prominent American officials who visit their posts constitute a considerable drain on their modest stipends. It is impossible to save from the salaries paid.

The next step undertaken by the bill was to create a new title of foreign service officer, which became the basis of salary, and of interchangeability. This title is common to all officers of career, whether serving in the consular branch or in the diplomatic branch of the service, and governs their classification. It is a superimposed title for administrative purposes only, and does not abolish the title of secretary or of consul through which the foreign status of those representatives is fixed.[7] A candidate now enters the foreign service by qualifying as a foreign service officer, the requirements for which are an examination, with a suitable period of probation in an unclassified grade, or five years of continuous service in the department of state. As to whether an officer thus appointed shall be assigned to the diplomatic or the consular branch is a matter for administrative determination.

The original bill provided for the classification of ministers into two classes,[8] namely: minister, class one, $12,000; minister, class two, $10,000. This was intended to suggest a continuance of the classified career service up through the grade of minister to that of ambassador, with a view to influencing the selection of trained, career officers for those positions. Embarrassments at once developed in this connection, as the assumption of legislative jurisdiction in relation to the appointment of ministers seemed to threaten an encroachment upon the constitutional powers of the President by seeking to limit or influence his choice of men.[9] How to encourage the selection by the President

[7] Foreign service officers may be appointed as secretaries in the diplomatic service or as consular officers or both: Provided, That all such appointments shall be made by and with the advice and consent of the Senate; Provided further, That all official acts of such officers while on duty in either the diplomatic or the consular branch of the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers. (Sec. 5, Act of May 24, 1924).

[8] Sec. 2, H. R. 17, 1st Sess. 67th Cong.

[9] "He (The President) shall name, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls." (Article II, Sec. 2, The Constitution.)

of career men for appointment to the grade of minister was an exceedingly difficult problem unless the classified service could be so extended as to include that grade.

Finally, a more effectual method was adopted. It consists of the simple formula of building a service in which the career officers will be men of such outstanding ability that their qualifications must, perforce, commend themselves to the President as against the claims of untrained political applicants from the outside. But even then, some instrumentality for focussing attention upon the meritorious achievements of the men in the service seemed indispensable as a means of advancing their claims for consideration. The manner in which this has been accomplished will be shown later in discussing the administrative regulations. But this was not all of the difficulty; for the grade of minister is exacting in its pecuniary requirements, and no career officer, however able he might have proved himself in diplomatic work, could afford to accept such a position in the absence of considerable private resources. If the service was to be democratized, and the career, with its rewards, held open to talent and ability, some provision must be made for relieving the burden of expense which devolves upon the higher diplomatic officers of the service.

President Taft very forcibly attacked the anomalous situation surrounding the position of minister and ambassador in 1910 when he stated:

"We boast ourselves a democratic country. We say that there is no place within the gift of the people to which we may not select the most humble inhabitant, providing he be fit to discharge its duty and yet we have an arrangement which makes it absolutely impossible for anybody but a millionaire to occupy the highest diplomatic post. Now I ask you whether that is consistency; whether it is not the purest kind of demagogy? By demagogy I mean the arrangement of an argument which seems to be in favor of democracy but which, when it actually works out, is in favor of plutocracy."[10]

[10] Address before the National Board of Trade, Jan. 26, 1910.

Secretary Hughes recently voiced a similar criticism in discussing the situation in the diplomatic service, by asserting: "It is a most serious thing to be compelled to say that a young man without means, who desires to marry and bring up a family after the American tradition, can not be encouraged to enter one of the most important careers that the country has to offer. I say bluntly that no American can face the facts without a sense of humiliation, and he is compelled to qualify his boasting of our intelligence and civilization so long as this condition continues."[11]

In seeking to remedy this condition, it was not deemed practicable or desirable to increase the salaries of ambassadors and ministers to a point that would cover all expenses incidental to representation and the maintenance of suitable diplomatic establishments abroad. The salaries of $17,500 in the case of ambassadors and $12,000 and $10,000 in the case of ministers were thought to be adequate when construed as a measure of compensation for services rendered. Lifting from their shoulders the burden of official, as contrasted with personal, expenses which rightfully belong to the government, became, then, a question of an additional allowance and not of an increase in salary. Other nations have for years granted to their diplomatic representatives what are known as *frais de représentation*, which include a wide range of such expenditures. Adopting this principle, the bill authorized the President to grant to diplomatic missions and to consular offices at capitals of countries where there is no diplomatic mission of the United States, representation allowances, the expenditure of which is to be accounted for in detail under regulations prescribed by the President. The enactment of this provision[12] constitutes one of the signal achievements of the new law.

Its salutary effect was brought out strongly by the Honorable Theodore E. Burton, temporary chairman of the Republican National Convention, in his keynote speech of June 10, 1924, as follows:

[11] Address before the Chamber of Commerce of the United States, May 18, 1922.

[12] Sec. 12 of the Act of May 24, 1924.

"We have passed and the President has approved the so-called Rogers Bill, placing our Diplomatic and Consular Service, with its rapidly increasing importance, on a higher plane and giving opportunities to others than millionaires to occupy the more important positions."

Through representation allowances, therefore, it now becomes feasible to promote career officers of ability, who are not men of wealth, to the grade of minister with the satisfying realization that their talents are henceforth available to the country and that such service in the national interest is brought within the range of their legitimate aspirations.

The retirement system, which constitutes the last of the four chief provisions of the law, is an adaptation of the civil service retirement and disability Act of May 22, 1920. It provides for contributions from the men at the rate of five per centum of their basic salaries and not exceeding an equal amount from the government. The age of retirement is sixty-five years, but the President may continue an officer on active duty until the age of seventy. The rate of annuities follows the percentage range established in the civil service retirement act, based on length of service and the average of the basic salary for a period of ten years next preceding the date of retirement, but eliminates the arbitrary maximum and mimimum provisos.[13] The benefits of retirement are retained in the case of officers promoted from the classified service to the grade of minister.

In the eventual working out of the retirement provision, the relative proportion between the amount contributed by the men in the service from their salaries and by the government through appropriations will be seventy-two per cent for the men and twenty-eight per cent for the government, thus realizing a system which approaches a self-sustaining basis.

[13] "Annuities shall be paid to retired Foreign Service officers under the following classification, based upon length of service and at the following percentages of the average annual basic salary for the ten years next preceding the date of retirement: Class A, thirty years or more, 60 per centum; class B, from twenty-seven to thirty years, 54 per centum; class C, from twenty-four to twenty-seven years, 48 per centum; class D, from twenty-one to twenty-four years, 42 per centum; class E, from eighteen to twenty-one years, 36 per centum; class F, from fifteen to eighteen years, 30 per centum."

Perhaps of equal importance to the Act itself are the administrative regulations,[14] giving practical effect to all the chief purposes of the law. In the new service all vacancies from class one to class nine are to be filled by promotion from lower classes, based upon ability and efficiency as shown in the service, and all admissions to the service are to the grade of foreign service officer, unclassified; that is, to the lowest grade.

The important function of personnel control is entrusted to a foreign service personnel board, composed of the undersecretary of state, two assistant secretaries of state, and three foreign service officers of high rank who constitute the executive committee of the board.

The authority of the board is advisory only and its recommendations are always subject to the approval of the secretary of state and of the President. All action taken by it is strictly nonpartisan, and based exclusively upon the record of efficiency of the officers concerned. Its members, individually and collectively have the authority to examine all records and data relating to the personnel of the service. In adjusting the reclassification of officers under the Act, the board was charged with examining into the character, ability, efficiency, experience and general availability of all officers for the purpose of establishing their relative ratings and making recommendations to the secretary of state.[15]

The permanent duties of the board include recommendations for the designation of counselors of embassy and legation; promotions within the service; assignments to posts; transfers from one branch of the service to the other; the appointment by transfer of those officers and employees of the department of state who, after five years of continuous service therein, have demonstrated special ability; and to submit to the secretary of state the names of those foreign service officers who, in the opinion of the

[14] Executive Order of the President, June 27, 1924.

[15] In the general reclassification effective July 1, 1924, there were 32 retirements on account of age; 5 officers dropped from the unassigned list of the diplomatic service; 8 diplomatic secretaries and 13 consular officers demoted; and 2 resignations. All other officers were reclassified as stipulated in the Act.

board, have demonstrated special capacity for promotion to the grade of minister. Each list thus submitted enumerates the names of the officers in the order of merit and is complete in itself, superseding all previous lists. A list of this character is submitted whenever there is a vacancy in the grade of minister or when requested by the President or the secretary of state, and in no case does it contain more names than there are vacancies to fill. Each such list is signed by the chairman and at least three members of the board, and if approved by the secretary of state is submitted to the President.

The board also considers controversies and delinquencies among the service personnel and recommends appropriate disciplinary measures where required.

Whenever it is determined that the efficiency rating of an officer is poor and below the required standard for the service, the personnel board so notifies the officer, and if after due notification his rating continues nevertheless to be unsatisfactory, his name is reported to the secretary of state with a full recital of the circumstances and a recommendation for separation from the service. In each case where such recommendation is made, the board at the same time notifies the officer of the action taken.

The proceedings of the board are strictly confidential, but it is made a part of the duty of the chairman, within a reasonable time prior to each meeting of the board for recommending promotions, demotions, or removals, to invite the chairman of the Senate committee on foreign relations and the chairman of the House committee on foreign affairs or some committee member designated by the chairman, to sit with the board through its deliberations without, however, participating in its decisions.

As an adjunct to the work of the personnel board the secretary of state has provided[16] for a complete survey once a year of all personnel records, ratings and accumulated material by an impartial board of review, which renders its report to the foreign service personnel board as a basis for fixing the relative standing of officers and employees.

[16] Departmental Order No. 295, June 9, 1924.

The board of review is composed of five members, under the chairmanship of the chairman of the executive committee, the remaining four being selected from foreign service officers of high rank by the secretary of state.

In addition to the personnel board, there is a board of examiners composed of the undersecretary of state, two assistant secretaries of state, the chairman of the executive committee of the foreign service personnel board, and the chief examiner of the civil service commission, or such person as he may designate in his stead.

The former diplomatic and consular examinations are consolidated into one examination for candidates, consisting of a written and an oral test. The subjects include: At least one modern language other than English (French, Spanish, or German by preference), elements of international law, geography, the natural, industrial, and commercial resources of the United States; American history, government and institutions; the history since 1850 of Europe, Latin America and the Far East; elements of political economy, commercial and maritime law.

We come now to an important innovation which is certain to evoke wide-spread interest and approval.

In the original Rogers Bill[17] there was a provision for the designation by the secretary of state, after preliminary examination, of foreign service pupils, between the ages of eighteen and twenty-five years to attend universities for a period of not less than three years, for the purpose of following stipulated courses of instruction preliminary to their appointment as foreign service officers. Such pupils were to receive an annual allowance of not exceeding $1,500 for expenses of subsistence and tuition, and were to enter into a written contract to remain in the service for a period of not less than five years from the date of appointment.

Such a diversity of opinion developed with respect to the merits of this experimental proposal that it was thought best, in the course of the revision, to eliminate it from the bill as not essential to the general plan of reorganization, and as a possible encumbrance to the measure.

[17] Sec. 15, H. R. 17, 1st Sess., 67th Cong.

The law, as enacted, provides for "a suitable period of probation in an unclassified grade" as an entrance requirement. By taking advantage of the opportunity thus afforded, it became possible to establish for the first time, an intensive course of instruction for all new appointees, giving them a thorough grounding in matters of fundamental import in connection with the foreign relations of the United States. Accordingly, the President by executive order, has established a foreign service school in the department for the instruction of new appointees.

The school is under the direction of a foreign service school board, or faculty, composed of the undersecretary of state, two assistant secretaries of state, the chairman of the executive committee of the foreign service personnel board, and the chief instructor of the foreign service school. The chief instructor is selected by the other members of the school board from among the officers of the foreign service, with the approval of the secretary of state. Other instructors are selected from among the qualified officers of the department of state, the foreign service, the other executive departments of the government, and other available sources in the discretion of the school board.

The term of instruction and of probation is one year, during which the new appointees are judged as to their qualifications for advancement and assignment to duty. At the end of the term, recommendations are made to the secretary of state by the personnel board for the dismissal of any who may have failed to meet the required standard of the service.

In order to give a thoroughly dependable appraisal of the reorganization act, the following is quoted from the testimony of Honorable Wilbur J. Carr,[18] at that time director of the consular service, now assistant secretary of state:

"In my judgment there have been two really fundamental measures in the entire history of this country for the improvement of the foreign service. The first was in 1856, when a bill was passed, . . . which gave form to the diplomatic and consular organization. . . . It was not until 1906 that there was

[18] Hearings on H. R. 17, Jan. 18, 1924.

another bill which pretended to improve the service, and that bill related wholly to the consular service and was a very excellent measure, and without which this bill could probably not be considered now. But the second measure in all the history of this country in relation to the foreign service, and by far the most important and most far-reaching, is this measure which you have before you. There has not been anything like it since the Government began to exist. In my judgment, if you enact it, you have a bill which will furnish the basic structure of the organization for your foreign service for 50 years, a bill on which you can build any kind of a foreign service you please, a bill on which you can provide for ministers and ambassadors, secretaries and consuls, in the light of what you believe to be responsive to the opinion of the country. I do not think I can stress too much the importance of this bill being enacted into law."

That Secretary Hughes is highly pleased with the reform in which he has played such an important role is evidenced by his recent, brief summing up of the achievement:

"Through the passage of the Rogers Bill the serious limitations and inadequacies inherent in our present Foreign Service adjustment have been removed, and a substantial basis of reorganization achieved. The date of its enactment marks the birthday of the new service broadened in the rewards which it offers to men of ability, permanently stabilized by statute, coördinated by amalgamation, rendered mobile by interchangeability, democratized and Americanized through a scale of compensation and representation allowances which eliminate the necessity for private incomes, and definite in its assurances that men who have spent their lives in the service will not be left devoid of resources when the age of superannuation arrives.

"Through this salutary legislation young men of ambition are offered a career of almost unparalleled opportunity and attractiveness, and the country receives its best assurance of security and substantial achievement in the future conduct of its foreign affairs."[19]

[19] *American Consular Bulletin*, July, 1924.

FREEDOM OF SPEECH[1]

DURING AND SINCE THE CIVIL WAR

RICHARD H. ELIEL

Of all the clauses in the Bill of Rights, the free speech guaranty stands foremost in the significance of the political principle it defends, and in the enduring vitality of the problems it puts before us. In an age of toleration bordering on indifference, the phrase protecting the free exercise of religion has been reverently consigned to a life of honored retirement; in the days of conscription "the right of the people to keep and bear arms" finds a place in constitutional structure similar to that of the vermiform appendix in the human body; and the good old search and seizure clause now is roused from a senile contemplation of other days only at rarest intervals, relapsing soon into a customary desuetude. But no such fate will ever befall the free speech clause. The human interest it defends is in a very real sense the most fundamental and permanent in the Bill of Rights, and no changes brought by the onward movement of civilization are ever likely to make the need for its protection less necessary.

For as long as human beings have tongues and minds they will say what they think, and they will think differently. Where the question is important and the issues vital or seemingly vital, such hatred and bitterness is likely to develop as will require a very strong constitutional guaranty and a reverential respect for the written word if oppression is to be prevented. In fact, all the rancor and bitterness attached to actual physical conflict are frequently found in scarcely diminished intensity to have gathered about mere polemics. And so, if the history of free

[1] This paper was awarded the first prize in the Harris Political Science prize essay contest in 1923.

speech, like the history of the rules of war, has been one long story of violations, evasions, and "expedient" actions, we cannot wonder at that fact, though we may deplore it.

War and the question of freedom of speech have gone together throughout the larger part of American history. Since the repudiation of the Sedition Law in 1800 and the penance paid by the government in the shape of several million dollars worth of remitted fines, no party has dared to make criminal in more or less normal times the discussion of such minor issues as the character and mental bias of the President. Although, to be sure, in libel suits and in the matter of radical activities and such deeds of violence as the assassination of President McKinley, the significance of the First Amendment has been continually brought under consideration, it is to the two great crises of American history, the Civil War and the World War that we must look for the best example of the theory and practice of free speech. Bringing with it, on the one hand, tremendous questions to be discussed and, on the other hand, the possibilities of serious consequences if the morale of the nation be weakened by that discussion, an important war has always compelled a reconsideration of the guaranty.

THE THEORY OF EXPEDIENT SUSPENSION

The man on the street, particularly the radical man on the street, examining the First Amendment, frequently comes to the conclusion that an absolute prohibition is placed upon all legislation interfering with the expression of opinion, actions only being punishable. At the opposite extreme is the theory acted upon during the Civil War. According to Lincoln, if it was necessary to suppress one part of the Constitution to save the rest of the document, such suppression was justifiable and legal. "I will cut off a limb to save a life," said Lincoln. There was little time for speculation upon the matter. Action was imperative, and no opportunity was given for a philosophical or legal consideration of the right of free speech. The North was honeycombed with the disaffected; the activities of the copperheads threatened the success of the armies in the field. At all costs,

apparently, the internal safety of the loyal states had to be secured; and so, when the army officers, with Lincoln's tacit consent, began to arrest agitators, the theory of the President, though protested, was never seriously challenged, and remained throughout the period the only theory of the rights of free speech put forth, and certainly the only one acted upon. Perhaps 38,000 men were thrown into prison by the military, without charge and without trial. The case of Representative Clement Vallandigham[2] is the classic illustration, and representing as it does the whole theory and practice of the Civil War period, may be treated somewhat fully.

Vallandigham was a Democratic congressman from Ohio, a man of copperhead leanings. On May 1, 1863, he delivered a speech in Knox County, Ohio, in which he bitterly attacked governmental policies, declaring, among other things, that "the present war is a wicked, cruel and unnecessary war," "a war for the freedom of the blacks and the enslavement of the whites," "a war not waged for the preservation of the Union." He was promptly arrested by General Burnside, in charge of the district, tried by a military commission for expressing sympathy with the rebels, found guilty, and placed in close confinement.

News of the arrest stirred up considerable indignation. In New York a protest meeting was held at which a letter from Governor Horatio Seymour of New York was read, attacking in vigorous terms the action of General Burnside. "The transaction involved a series of offences against our most sacred rights," wrote Governor Seymour. "It interfered with the freedom of speech, it violated our rights to be secure in our homes against unreasonable searches and seizures. . . . . If it is upheld, our liberties are overthrown. The safety of our persons, the security of our property will hereafter depend upon the arbitrary wills of such military rulers as may be placed over us, while our constitutional guarantees will be broken down."

In his famous reply to Governor Seymour, Lincoln defended his suspension of the civil guaranties. The rebels, he said, were

[2] Cf. Ambrose Tighe, "Legal Theory of the Minnesota Safety Commission Act," 3 *Minnesota Law Review*, 1.

relying upon the Constitution to help destroy itself. "It undoubtedly was a well pondered reliance with them that in their own unrestricted efforts to destroy Union, Constitution, and law altogether, the government would in great degree be restrained by the same Constitution and law from arresting their progress. Under cover of 'liberty of speech,' 'liberty of the press' and 'habeas corpus' they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers, aiders, and abettors of their cause in a thousand ways. . . . Thoroughly imbued with a reverence for the guaranteed rights of individuals, I was slow to adopt the strong measures which by degrees I have been forced to regard as being within the exceptions of the Constitution, and as indispensable to public safety." The ordinary instruments of justice, the courts, were incompetent to grapple with the vast hordes of insurgent sympathizers, wrote Lincoln. Further, "he who dissuades one man from volunteering or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. And yet this discussion or inducement may be so conducted as to be no defined crime of which any civil court can take cognizance. . . . Must I shoot a simple minded soldier boy while I must not touch a hair of a wily agitator who induces him to desert? I think that in such a case to silence the agitator and save the boy is not only constitutional but withal a great mercy."

The suppression of free speech in the face of serious emergency Lincoln further justified on the ground that measures illegal in peace may be legal in war. "I can no more be persuaded that the government can constitutionally take no strong measures in time of rebellion because it can be shown that the same could not lawfully be taken in time of peace than I can be persuaded that a particular drug is not good medicine for a sick man which is not good for a well one." And, replying to the fear expressed that the nation, by this new venture into the uncertain regions of repression, might find the new fields and pastures more to their liking than the old, Lincoln said, "Nor am I quite able to appreciate the danger apprehended by the meeting that the American people will by means of military arrests during the rebellion lose the

right of public discussion, the liberty of speech and of the press, the law of evidences, trial by jury, and habeas corpus throughout the indefinite peaceful future which I trust awaits them, any more than I am able to believe that a man could contract so strong an appetite for emetics, during temporary illness, as to persist in feeding upon them during the remainder of his healthful life."

The evident seriousness of the situation gave strong support to Lincoln's position, and public opinion generally acquiesced.[3] There existed in many quarters, however, an undercurrent of protest which occasionally found expression, as for instance in the words of Representative C. A. Wickliffe of Kentucky, who declared that "the freedom of speech and of the press is prohibited by the military power. In vain does the citizen hold up the Constitution of his country and read to his oppressors these words: 'Congress shall make no law abridging the freedom of speech or of the press.' We have now no 'Sedition Law' on the statute book, but we have a power in full operation by force—the bayonet—more dangerous to liberty."[4]

After the war, the constitutionality of Lincoln's action came before the Supreme Court in the case of Ex Parte Milligan.[5] Milligan in 1863 and 1864 made a number of public speeches in uninvaded areas, in which he said that the purpose of the war was to break down the influence of the agricultural districts of the country and elevate the moneyed and manufacturing interests. He was arrested and condemned to death by a military commission for giving aid and comfort to the enemy and inciting insurrection. The case being carried to the Supreme Court on a technicality, the court declared that "martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration." Furthermore "not one of these safeguards [in the Constitution and Bill of

[3] Cf. James Parker Hall, "Free Speech in Wartime," 7 *University Record* 77 (University of Chicago, 1921).

[4] *Congressional Globe*, App. pt. 2, 37th cong. p. 90.

[5] Ex parte Milligan, 2 Wallace, 125.

Rights] can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus," and "they [the Fathers] limited the suspension to one great right, and left the rest to remain forever inviolable."

In spite of this decisive repudiation of the right of the executive to suspend the guaranty of free speech, should pressing occasion so demand, the doctrine has reappeared in recent years. In the case of Mayer v. Peabody,[6] arising from labor troubles, the court restated and approved Lincoln's position in these words. "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment."

It was the recent World War, however, which again gave prominence to the possibilities of this theory as a rule of action. There were some to whom the emergency created by the conflict with Germany equalled in gravity the situation during the Civil War, and who believed that the activities of the disloyal so strenuously denounced and repressed by Lincoln were no whit more dangerous than the agitation of those not fully in accord with the war policies. Impressed with the supposed dreadful menace of German success and the presumed probability of a disruption of our forces should national unity be in the slightest degree weakened by criticism, they favored the adoption of Lincoln's "amputation" idea, declaring as did a Methodist clergyman, Bishop Cook, for instance, that "liberty of speech is a poor compensation for destruction of liberty."[7]

Although in the recent war there was, they said, no actual encounter of armed forces on American soil, yet the many activities of German agents, the Liberty Bond campaigns, the shipyards, the munition factories, the training camps, were felt to make the United States a theatre of war, in which attacks were as dangerous to our cause as if made upon the soldiers in the trenches.[8] The complete dependence of the armies in the field upon the man behind the gun and the man behind the hoe had so changed the organization of war that each individual had to be

[6] Mayer v. Peabody, 212 U. S. 78 (85) (1908).
[7] 62 *Literary Digest*, 45, July 5, 1919.
[8] Cf. Chafee, *Freedom of Speech*, p. 7.

regarded as an essential part of a huge fighting machine, and tampering with either element equally dangerous. They quoted Ludendorff's remark that wars are no longer won by armies in the field but by the morale of the whole people. It was hardly conceivable, they said, that one clause of the Constitution could be used against another, that the Constitution should cripple its own efforts to maintain public safety. But whether it did or not, self-preservation was the first law of the state. "If it be the true meaning of the Constitution," maintained one writer, "that the war power has been fettered by provisos which put the liberty of the citizen above the safety of the state, then either the experiment of self-government will prove a failure or the chosen leaders of the people must, when necessary, disregard mere paper barriers. . . . It would be wiser to adopt that interpretation of the fundamental law which legalizes whatever imperative necessity compels."[9] The same doctrine that the Bill of Rights is a peace-time document, to be suspended in time of war if deemed expedient or necessary, was preached with regard to the states. An official of Minnesota declared that: "in time of war the government of every state has inherent power to do all acts and things, necessary or proper to defeat the enemy, and it is performing its full duty to the Constitution when it exercises every form of activity to preserve the state, on the preservation of which the existence of the Constitution itself depends."

The theory of war-time suspension, however, did not gain a very wide acceptance, although judging from some of the convictions it might have been easy to infer for it a more favorable reception on the part of many officials than they themselves were willing to admit. Only the more hysterical really believed that the consequences of an orderly discussion and criticism would be as perilous to the nation as those who demanded a complete suppression of the guaranties endeavored to make out. To the argument that it was never intended to limit by one

[9] Henry J. Fletcher, "The Civilian and the War Power," 2 *Minnesota Law Review*, 113 (1918).

clause the operations of another, and that since it was wartime the war power must not be hampered by the guaranty of free speech, but must take precedence over it, those who defended the uninterrupted activity of the First Amendment replied that the First Amendment was written by men who had just passed through a severe war and who were well aware of its probable effects. The First Amendment must restrict the powers granted to Congress since Congress has no other powers, and must apply to the activities which are most apt to interfere with free discussion, namely, the postal service and the conduct of the war.[10]

An official repudiation of the doctrine is found in a report of the department of justice. "This department throughout the war has proceeded upon the general principle that the constitutional right of free speech, free assembly, and petition, exist in war time, as in peace time, and that the right of discussion of governmental policy and the right of political agitation are the most fundamental rights in a democracy."[11]

BLACKSTONE'S THEORY OF PREVIOUS RESTRAINT AND COOLEY'S MODIFICATION

If we now classify as conservative the theory above dealt with, which proposes the wartime extinction of free speech, we may also discover the relatively moderate and the liberal theories. The extinction doctrine to be sure, is a theory of free speech in wartime only, while the others are theories of free speech *per se*, but the classification, if not perfectly logical, is convenient. The distinction between the conservative and moderate lies obviously in the fact that the one upholds the complete wartime suspension of free speech, while the other does not. The distinction between the moderate and liberal theories is to be found in a comparison of the lengths to which each will allow discussion to go, and also in the nature of the tests of criminality: the former being legalistic in attitude and setting up as the touchstone of guilt the fulfilment of certain legalistic tests; the latter taking a

[10] Chafee, "Freedom of Speech in Wartime," 17 *New Republic* 66 (1918).

[11] Report of the Attorney General (1918) 20, quoted in Chafee, *Freedom of Speech*, p. 7.

circumstantial view and considering the probable consequences of each case. The theories classified as moderate, it hardly need be said are not homogeneous, but begin on the one side with doctrines scarcely to be distinguished from the liberal, and on the other side merge into the theory of wartime extinction.

We have first to begin with a theory once dominant in our constitutional history, but now largely replaced, namely, the Blackstone theory of previous restraint, and its modifications. According to Blackstone, "the liberty of the press . . . consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published."[12] The adherents of this doctrine maintained that the First Amendment had enacted Blackstone's definition. An American statement of the theory, if anything a little more radical than the original, was made by Justice Holmes in the case of Patterson v. Colorado.[13] "The main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends to the false as well as to the true; the subsequent punishment may extend to the true as to the false." Justice Holmes has since repudiated this interpretation of freedom of speech, but his words have had some influence, particularly in state espionage act cases.

The Sedition Law of 1798 was upheld by the Federalists on the ground that it was in full accord with the accepted theory. "The Sedition Act," said Story in his treatise on the Constitution, "did not restrain the liberty but punished the licentiousness."[14] The failings of this doctrine are made evident by Story's remark. It has been attacked as lacking in common sense and inconsistent with the facts of life. "The prohibition of previous restraint would not allow the government to prevent a newspaper

[12] Quoted in Chafee, *op. cit.* p. 8.

[13] Patterson v. Colorado, 205 U. S. 454 (1906).

[14] Story, *Commentaries on the Constitution*, sec. 1880; see also Schofield, 9 *Publications American Sociological Society* 69.

from publishing the sailing dates of transports or the number of troops in a sector. It would render illegal removal of an indecent poster from a billboard or the censorship of moving pictures before exhibition."[15] On the other hand, unrestrained freedom to advocate the doctrines of Karl Marx, with a penalty of life imprisonment after the issuance of the words, would be a most amazing piece of legal irony, the actual working out of which would be indistinguishable from the most rigid censorship.

Cooley has given an interpretation of the First Amendment designed to obviate at least the latter part of the difficulty. In Cooley's theory the preliminary freedom extends to the false as well as to the true, as Justice Holmes has phrased it, but the subsequent punishment may extend only to the false or harmful. Cooley believed "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as . . . the liberty of the press might be rendered a mockery and a delusion and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. The constitutional liberty of speech and of the press as we understand it, implies a right to freely utter and publish whatever the citizen may please and to be protected against any responsibility for so doing, except so far as such publications from their blasphemy, obscenity, or scandalous character, may be a public menace, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or to state the same theory in somewhat different terms, we understand liberty of speech and of the press to imply not only liberty to publish but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when tested by such standards as the law affords."[16]

It can be seen that into the simple and easily workable (too easily workable, in fact) Blackstonian doctrine, Cooley has introduced a new and perplexing problem. In the unaltered theory

[15] Chafee, *op. cit.*, p. 10.
[16] Cooley, *Constitutional Limitations*, 6th ed., pp. 517, 518.

of Blackstone there was to be no previous restraint; the line where suppression might begin was fixed at the moment after publication, and once publication or utterance was an accomplished fact the restrictions upon the government ceased and it might do whatever was deemed suitable. But Cooley adds immunity in the utterance of anything not harmful, reserving to the government the right of holding a citizen responsible only for such utterances as are harmful in nature. We have then the problem of deciding what is harmful and what is not harmful.

In solving this problem, Cooley approved a distinction between utterances of a public and private purpose. The type of publications, blasphemous, scandalous, obscene, false, malicious, or injuriously affecting the interests of individuals, for which the citizen must be held responsible, are indicated in the quotation above cited. The immunity to "utterances not harmful" is meant to include the discussion of matters of public concern. The purpose of the First Amendment "has been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion. . . . To guard against repressive measures . . . by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation was the general purpose. . . . The evils to be prevented were any actions of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[17]

Beyond this we must test harmfulness "by such standards as the law affords. For these standards we must look to the common law rules which were in force when the constitutional guarantees were under consideration and in reference to which they were adopted."[18] Cooley's position, therefore, is that the First Amendment did not modify the rules of the common

[17] *Ibid.*, p. 517.
[18] *Ibid.*, p. 518.

law which protected private character from detraction and abuse, but did modify those laws so far as they related to seditious libel.

If we attack the problem of free speech from the standpoint of specific crimes instead of in such terms as "harmful" and "not harmful," much will depend upon the answer to the question of whether or not the Fathers intended to enact the English law of seditious libel. We have now, in other words, the question of what free speech really means from the point of view of content. The theory of wartime suspension was nothing but a theory of the right of expedient repression, and made no effort to define the meanings included in the concept of free speech; and the Blackstonian theory was merely a definition of the sphere in which the citizen was safe from governmental interference. With Cooley's view we have for the first time the idea of certain activities for which the citizen is protected from responsibility, and certain others for which he must answer.

Although Cooley repudiates the English crime of seditious libel, "the intentional publication without lawful excuse or justification of written blame of any public man, or of the law, or of any institution established by the law,"[19] the almost unanimous view of our judges throughout American history has been that the constitutional declarations of liberty of speech and press are only declaratory of the English common law right and are not expansive of that right or creative of any new right.[20] Thus, the court said in the case of Robertson v. Baldwin:[21] "The first ten amendments. . . were simply intended to embody certain guarantees and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well-recognized exceptions. There was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." But in recent years there has appeared a vigorous attack upon this theory.

[19] Chafee, *op. cit.* p. 20.

[20] Cf. Schofield, *op. cit.* p. 68.

[21] Robertson v. Baldwin, 165 U. S. 275 (1897); see also H. C. Black, *Constitutional Law*, 3rd ed, p. 651.

Justice Holmes, in the minority report of the case of Abrams v. United States,[22] said, "I wholly disagree with the arguments of the government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act by repaying fines that it imposed."

One writer, Professor Schofield, concluded that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press. . . . Liberty of the press as declared in the First Amendment, and the English common law crime of sedition cannot co-exist."[23] Professor Chafee, after an examination of statements by Jefferson, Franklin and Madison, decided that the national leaders, recognizing that in England the king was legally master, while in America the people occupied that position, had no intention of carrying over into this country a doctrine so manifestly deduced from the theory of divine rights. The English sedition law had been detested by the nation ever since the trial of Peter Zenger, the New York printer. It would be strange, thought Chafee, if the First Amendment enacted the law of seditious libel, which was repudiated by every American and every liberal Englishman, and altered by Parliament in 1791 through Fox's Libel Act. "The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition and make further prosecutions for criticism of the government without any incitement to lawbreaking, forever impossible in the United States."[24]

THE THEORY OF LIBERTY V. LICENSE

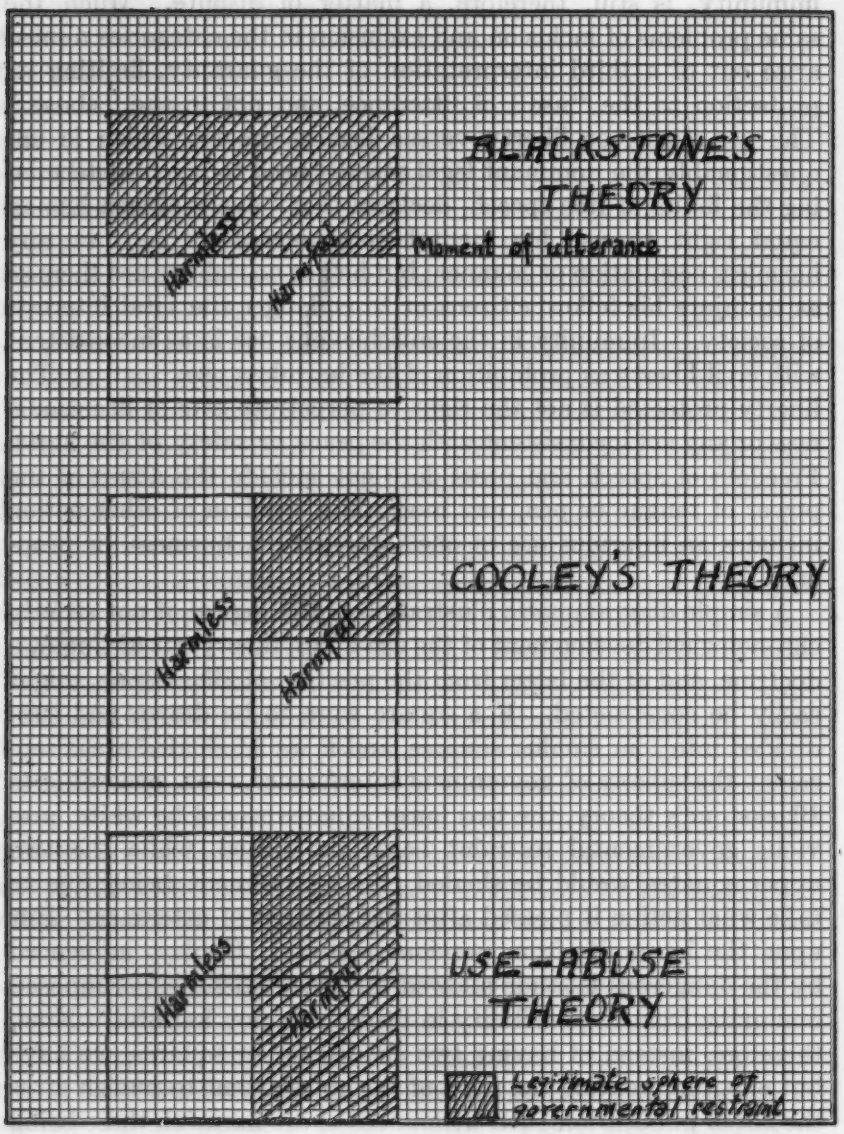
The validity of Cooley's classification of the utterances harmful and not harmful, based upon his assumption that the English rule of seditious libel was not carried over into American law, but that the discussion of public matters was granted a special

[22] Abrams v. U. S. 250 U. S. 616 (1919).
[23] Schofield, *op. cit.* p. 76.
[24] Chafee, *op. cit.* p. 23.

immunity, is still, therefore, a matter of dispute. Much the same problems of inclusion and exclusion in the categories named arise out of a third interpretation of the guaranty, limiting its protection to the "use" of utterance, and not to the "abuse." The use-abuse, or liberty versus license theory, which is unquestionably the dominant legal concept used today in determining the limits of free speech, declares that "every citizen has an equal right to use his mental endowments . . . in any harmless occupation or manner; but he has no right to use them so as to injure his fellow citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. . . . The liberty protected is not the right to perpetrate acts of licentiousness or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property."[25]

A simple diagrammatic illustration of the logical, if not strictly chronological development of the use-abuse theory out of Cooley's doctrine, and of the latter from the position of Blackstone, might easily be constructed. If a square were to be drawn and subdivided into four smaller squares, and if we let shaded areas represent the spheres of government interference, then, according to Blackstone's theory, the two lower squares would be white, previous governmental restraint being prohibited, while the two upper squares would be shaded, the government being free to take what action it pleased after the moment of utterance. But upon the immunity from previous restraint, Cooley, influenced by the dangerous latitude allowed the government, superimposed immunity from responsibility in utterances not harmful. Now, therefore, instead of having two shaded upper squares, we have but one, representing the right of the government to punish after the act of publication such utterances as are harmful, these being in Cooley's view largely utterances of a private nature. Still

[25] State v. McKee, 73 Conn. 18 (1900); see also Toledo Newspaper Co. v. U. S., 247 U. S. 402 (1918).


BLACKSTONE'S THEORY
Moment of utterance
harmless
harmful
COOLEY'S THEORY
harmless
harmful
USE-ABUSE THEORY
harmless
harmful
Legitimate sphere of governmental restraint

we have the right of publication of harmful matter free from any previous restraints, as in the original Blackstonian theory. The possible evils of such immunity have been pointed out before. The use-abuse theory shades in the square representing immunity from previous restraint in the publication of harmful matter, so that we now have harmful utterances completely in the sphere of government repression. We started out with the two upper squares shaded; a horizontal darkened area placed above a white area; we now have a vertical unshaded area next to a vertical shaded area. The line of division in the first instance is chronological; it is, in the last, logical.

That part of the Blackstone theory which prohibited previous restraint from publication of utterances judged harmful, broke down in fact long before the recent war. For instance in 1909, Emma Goldman was prevented by the police from delivering a series of scheduled lectures.[26] She appealed to the courts. The defendants declared that, "the delivery of the contemplated lecture would (in their judgment) have resulted in a serious breach of the peace, because of the character of the sentiments and ideas which the plaintiff intended to utter."[27] The defendants were upheld by the court, which declared that interference was justified "by the knowledge that dangerous and disturbing sentiments tending to disturb the peace would be uttered." The majority of war decisions were based upon the use-abuse theory, and not upon the doctrine of Blackstone.[28]

During the recent war, in the determination of what was liberty and what license, most of the courts used three tests, bad tendency, bad intent, and direct or indirect incitement, with reference to two standards set up and generally accepted by the public mind—the success of our cause in war, and the preservation of our laws from violation and our form of government from forceful subversion. Commonly if a speaker's words were decided by the jury to fulfill any or all of these tests, he was held to be abusing the right of free speech.

[26] Cf. Gilbert E. Roe, 9 *Publications American Sociological Society* 38.
[27] Goldman v. Reyburn *et. al.* 28 Penn Dist Reports 88; quoted by Roe.
[28] See for instance Schenk v. U. S. 249 U. S. 47 (1918).

Taking, to begin with, the test of bad tendency, most judges held that words to be criminal need only have a tendency to cause unrest among soldiers or civilians, or make recruiting or the general conduct of the war more difficult. We have the case of the Rev. Clarence H. Waldron, of Windsor, Vermont,[29] who was charged with handing out to five persons, only one of whom was eligible for military service, a pamphlet which argued that if Christians were forbidden to preserve Christ, surely they could not fight to preserve themselves or their country. "Better a thousand times to die than for a Christian to kill his fellow."

The Rev. Waldron was convicted for causing insubordination and obstructing recruiting, and sentenced to fifteen years in prison. Another man was given a long term for declaring that the war should have been financed by taxation instead of by bonds, on the ground that his words tended to discourage the buying of Liberty bonds. Statements such as "no soldier ever sees those socks," criticism of food at a training camp, the assertion that the government ought to supply the Red Cross with funds instead of always sending men to ask for money, were punished with ten to twenty-year sentences. An argument against the constitutionality of the Draft Act, before the Supreme Court had passed upon its validity, was punished with twenty years.[30]

A part of the bad tendency theory is the even broader doctrine of remote bad tendency. The remark, "on soldier ever sees those socks," if addressed to a knitting club may conceivably directly affect the output, but how if the remark be addressed, let us say, to an audience of one-armed men. This is perhaps a ridiculous illustration, but convictions resulted in cases where the bad tendency was just about as remote, on the theory that the morale of the folks at home might possibly be weakened, which in turn might possibly injuriously affect the morale of the fighting men. When Rose Pastor Stokes made an argument against the war, addressed to women, using these words, "I am for the people, and the government is for the profiteers," she was indicted, because what was said to mothers, sisters, and sweethearts might

[29] Chafee, *op. cit.* p. 61.
[30] *Loc. cit.*

lessen their enthusiasm for the war, and "our armies in the field and our navies upon the seas can operate and succeed only so far as they are supported and maintained by the folks at home.[31] In Minnesota the courts held that the local espionage act was violated though not a single person was dissuaded from enlisting, and even though the jury found that the speaker had not the slightest intention of hindering enlisting. It was sufficient if the "natural and reasonable effect of the statements uttered was to deter those to whom they were made from enlisting or giving aid.[32]

In most cases, however, the courts would have deduced from such a "natural" and "reasonable" bad tendency a bad intent also on the part of the speaker, by what Professor Freund calls "the damning doctrine of inferential intent."[33] That is to say, on the ground that a man is presumed to intend the consequences of his acts, a person writing an exposé of governmental graft and incompetence, as has been frequently done in the last years, might have been accused of a disloyal intent, inferred from the presumed bad tendency of his words, and this bad intent might be used as a factor in determining guilt. Or if a man criticize the conduct of the war or vigorously advocate the change of a law, it is to be presumed that he intended to weaken the United States in the one case, or incite disobedience in the other, simply because his words had, or were supposed to have, such tendencies.

To be sure, some judges rejected the doctrines of inferential intent and bad tendency. Judge Augustus Hand in his charge to the jury, in the Eastman trial[34] said: "Every citizen has a right without intent to obstruct the recruiting or enlistment service, to think, feel, or express disapproval or abhorrence of any law, or policy, or proposed law or policy, including the Declaration of war, the Conscription Act, and the so-called sedition

[31] Cf. Chafee, *op. cit.* p. 58, quoting Judge Van Valkenburgh in U. S. v. Rose Pastor Stokes.

[32] Cf. Chafee, "Free Speech and States Rights," *New Republic*, Jan. 26, 1921, p. 25.

[33] E. Freund, "Freedom of Speech and Press," 25 *New Republic* 344.

[34] Cf. Chafee, *op. cit.* p. 86.

clauses of the Espionage Act; belief that the war is not or was not a war for democracy; belief that our participation in it was forced or induced by powers with selfish interests to be served thereby; belief that the war is horrible; belief that the allies' war aims were or are selfish or undemocratic. . . . It is the constitutional right of the citizen to express such opinions even though they are opposed to the opinions or policies of the administration, and even though the expression of such opinion may unintentionally or indirectly discourage recruiting and enlistment." Judge Hand was reversed.

Quite evidently the meaning of the use-abuse theory depends entirely upon the doctrines used to interpret it and draws the line between the white and shaded areas. By the almost unlimited powers which the doctrines of bad tendency, remote bad tendency, and inferential intent, give to it in the repression of words possibly detrimental to our war interests, the use-abuse theory was capable of becoming and sometimes did become a close copy of the theory of wartime suspension. In fact the only difference between them in some cases was that one openly and frankly set aside the guaranty for the time being, while the other still gave it lip service, though drawing the line so close to the margin as to make the practical results quite the same. The arguments in both cases were similar. On the other side, the two doctrines were subjected to attack by the liberal and radical press, and by such publicists as Chafee, Freund, and Pound. As for bad tendency, they said, almost any opinion can be found to have some bad tendency in it, particularly by an overwrought and hysterical judge and jury, and suppression on that account would put an end to discussion. Chafee quoted Jefferson, "To suffer the magistrate to intrude his powers into the field of opinion and to restrain the profession of principles on supposition of their ill tendency is a dangerous fallacy, because he, of course, being judge of that tendency, will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they square with or differ from his own."[35] The application of

[35] Cf. Chafee, *op. cit.* p. 31.

constructive intent was declared to punish states of mind and not acts; furthermore the judicial machinery, whatever it might be in other matters, was said to be totally unfitted to act in questions involving national animosities or class hatreds, if distinction between good and bad intent were to be taken as a basis for decision. Finally, truth, whether uttered with good or bad intent, is truth and to be valued as such. The man who criticizes the conduct of the war and points out incompetency may speak with an evil purpose and yet may be performing a very great service to the nation.

A more liberal doctrine is that of direct incitement. This doctrine declares that although any discussion intended to show the injustice of a law or the error of a policy may lead to violalation or disobedience, yet until a speaker directly incites his audience to violation or disobedience, he cannot be held to have abused the liberty of speech. This, asserted Mr. Palmer, was the theory of the department of justice. "It seems to me perfectly plain that there must be a dead line across which men cannot go in the exercise of the right of free speech, if the government is going to be permitted to defend itself as a people's government. And I am of the opinion that it is easy to draw that dead line. . . . It ought to be drawn. . . at the point where there is attempted or actual use of or a threat or necessary implication of the use of force. . . . I am perfectly willing to use the words 'physical force'. . . . I have sometimes used this illustration: 'It is perfectly proper for a man to stand on a soap box here on Pennsylvania Avenue and harangue a crowd to the effect that he believes the government of the United States is wrong, built upon the wrong principles, and that Congress is a useless appendage. It is perfectly proper for him to say that he favors the abolition of the Congress of the United States . . . . or the abolition of the Constitution of the United States . . . and the substitution of a communist form of government.' But when he says, 'I believe the Congress of the United States ought to be abolished and propose to abolish it by walking up to the Capitol and planting a bomb under the House of Representatives and blowing those Congressmen to

high heaven,' then it is something more than mere self preservation that would lead you to say that he has stepped over the dead line by the advocacy of the use of force. . . ."[36] Only therefore when speech becomes the partisan to crime or the incitement to disobedience or violence is it punishable. Utterances to be suppressed must "by the rules of the common law, constitute attempts or incitements to commit crimes against the government."[37]

LEGISLATION

A brief consideration of legislation concerning freedom of speech is proper at this point, for modifications and variations of the abuse theory were largely expounded in connection with cases brought up under the espionage acts.

During the Civil War such free speech cases as were dealt with through the courts were taken care of by the ordinary criminal law. In the period between the Civil war and the World War, one or two statutes were passed as a result of such activities as the assassination of McKinley. In 1902, New York, for example, passed a law punishing criminal anarchy. On June 15, 1917, Congress passed the Espionage Act, which established three offenses: First, false statements or reports interfering with the military or naval operations or promoting the success of our enemies; second, causing or attempting to cause subordination, disloyalty, mutiny, or refusal of duty in the military and naval forces; and third, obstruction of enlistment and recruiting. A year later a much more drastic amendment was passed, introducing new crimes, such as the bringing of the government or Constitution into scorn. The text punishes: "Whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States . . . or any language intended to bring the form of government of the United States or

[36] Palmer, Hearing before the committee on the Judiciary, H. R. 66th Cong, 2nd Sess, p. 21.

[37] Chafee, "Free Speech in Wartime," 32 *Harvard Law Review* 932.

the Constitution of the United States . . . into scorn, contumely, or disrepute, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or . . . oppose the cause of the United States . . ." Thus where the original law punishes only utterances connected with some phase of our military endeavors, the amendment makes several types of utterance criminal in themselves, and adds the test of bad intent.

After the armistice several bills were proposed extending the provisions of the above laws into peace-times. One such was the Graham bill, which in addition to the standards elsewhere enumerated also proposed the new standard of property. The Graham bill proposed to make it unlawful for any person to speak in any assembly where the indirect result of his speech would be injury to private property. For example, any speech on politics, or economics, or inducing a strike, the indirect result of which might be the destruction or injury to private property, would be illegal. The bill was not passed.

The court having decided in the case of Gilbert v. Minnesota that the states retained the right to pass legislation limiting freedom of speech, most of the states proceeded to pass local sedition laws, many of them more drastic than the national statutes.

THE LIBERAL INTERPRETATION OF THE USE-ABUSE THEORY

The exceedingly rigorous enforcement of these state and national laws provoked a reaction in favor of a more liberal doctrine interpreting the first Amendment. The proponents of the newer theory rejected the assumptions of the great peril threatened by radical speech directed against our national institutions and our national cause. On the other hand, they were greatly impressed by the interests which free speech served to promote. These were, first, the individual interests involved in the mere expression of feelings deeply felt and difficult of repression. Then again, the mere getting of ideas out of one's system was felt to have a social significance and an inherent value to the existing order, for, said Justice Holmes, "with effervescing opinions as with the

not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to the air." This social interest has never been properly recognized. The difficulty, said Dean Pound,[38] has been that free speech was generally regarded as possessing an individual interest only, and as such to be retired from the stage whenever such social interests as the conduct of the war become prominent. As an individual interest it has usually been treated in our constitutions. If a pressing individual interest be balanced against a pressing social interest the latter usually survives.

There is also a social interest in free speech as a guaranty of political efficiency and an instrument of progress; and this social interest must be balanced against the social interests in repression. Senator Poindexter, urging naturally enough the right of a prolonged and continuous criticism of the conduct of the war, declared that without free speech, "selfishness, dishonesty, and incompetence would flourish in office and disaster would soon follow. If the free operation of public opinion is essential in time of peace it is more essential in time of war, because of the vital character of the issues involved."[39] Truthful criticism is essential to the life of the nation, and truth can only be secured through free discussion. "In the absence of free discussion organized lies may have bred unchecked among those who upheld the course of the government in Russia," said Justice Holmes.[40] "The best test of truth is the power of the thought to get itself accepted in the competition of the market, and truth is the only ground upon which wishes safely can be carried out."[41] To be sure the preservation of free discussion also makes possible the dissemination of lies and false propaganda. But if national institutions are so poorly rooted in the affections of the people that the evil words of the few can dislodge them, if like the walls of Jericho the constitutional structures may be overturned by a mere blast of air, then they are hardly worth defending. That possibility

[38] Pound, "Interests of Personality," 28 *Harvard Law Review.*
[39] Poindexter, "Your Right to Speak Freely," 60 *Forum* 670.
[40] Chafee, *op. cit.* p. 158.
[41] U. S. v. Abrams, 250 U. S. 616 (1919).

is not worth considering. The arguments of thousands of speakers and editorial writers ought to be sufficient to refute any false doctrines which happen to be urged. Argument should be met with argument, for if force is used, who can be sure that it will be used on the right side? If force is used truth loses its superior survival values. Such is the doctrine of the liberals, summed up.

But this group of men, including Justice Holmes, Justice Brandeis, Judge Hand, Dean Pound, Professor Freund, and Professor Chafee, do not propose an altogether unlimited free speech. Another doctrine for the interpretation of the use-abuse theory, the test of clear and immediate danger, is suggested, in determining which, not only the words uttered but the situation in which they are uttered, must be considered. "The character of every act depends upon the circumstances in which it is done."[42] "We can suppose a series of opinions ranging from 'This is an unwise war' up to 'You ought to refuse to go, no matter what they do to you" or an audience varying from an old woman's home to a group of men just starting for a training camp," said Chafee.[43] If, after a consideration of the circumstances in each case, the nature of the words used, and the character of the audience, the decision is reached that there is a clear and immediate danger that the words will eventuate in acts dangerous to the state, then the utterance is punishable. In his report in the Schenk case, Justice Holmes said, "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils Congress has a right to prevent."[44] In the minority opinion in the Abrams case,[45] he declared that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so immediately threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. Only the

[42] U. S. v. Schenk, 249 U. S. 47 (1919).
[43] Chafee, *op. cit.* p. 53.
[44] U. S. v. Schenk, 249 U. S. 47 (1919).
[45] U. S. v. Abrams, 250 U. S. 616 (1919).

emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.' "

THE SUPREME COURT AND THE CONSTITUTION[1]

ALAN H. MONROE

Ever since the famous case of Marbury v. Madison in 1803, the United States Supreme Court has exercised the power of declaring acts of Congress unconstitutional and of refusing to enforce them as law. From the beginning, the exercise of this power has been the subject of great controversies as to both theory and practice. It has been assailed as subverting the true nature of our government. It has been stigmatized as the foundation of a judicial obligarchy. It has been attacked as a means for the nullification of the popular will as expressed in Congress. It will be the purpose of this paper, therefore, to inquire into the use of this power in relation to acts of Congress with especial regard to (1) the criticisms that have been made at various times throughout American history, and (2) the proposals that have been made to modify the exercise of this power.

CRITICISMS OF JUDICIAL NULLIFICATION BY THE SUPREME COURT

The earliest criticisms of the use of this power grew out of the conflicting views of the state-rights exponents and those who favored a strong national government. At first, the opponents of the Federalists, together with the southern statesmen, recognized in this power their protection against the possible expansion of federal power at the expense of the states. In 1789, several senators and representatives made speeches in Congress in which they ardently supported it. Among these were Abraham Baldwin of Georgia, John Page and Alexander White of Virginia, and William Smith of South Carolina. Indeed, Elbridge Gerry went so far as to say, "The judges are the constitutional umpires in such questions. . . . We are not the expositors of the constitution, the judges are the expositors of the constitution and acts of Congress."[2]

[1] This paper was awarded the first prize in the Harris Political Science prize essay contest in 1924.

[2] *Annals of Congress*, 1st Congress, 1st Session, June 16 to 22, 1789, especially pp. 492, 596.

Even at this early date, James Madison voiced his disapproval by saying, "An exposition of the constitution may come with as much propriety from the legislature as from any other department of government."[3] But on the whole, the early criticism made by the Republicans was not made because of the exercise of the power of judicial review, but because of a failure to exercise it. In 1798 Congress passed the Sedition Act which was attacked on the grounds that it obstructed free speech. When the federal judges upheld it, the state-rights champions objected, and soon embodied their objections in the Virginia and Kentucky resolutions of 1797 and 1798.[4] Thus "before the principle of judicial review was supported by a single authoritative decision, it had become a partisan issue."[5]

It was not until the debate on the repeal of the Judiciary Act of 1801 that the power of the courts to pass on the constitutionality of acts of Congress was seriously questioned. In 1800, Charles Pinckney of South Carolina had denounced it as "a right as unfounded and as dangerous as any ever attempted in a free government."[6] In 1802, when the Federalists argued that the repeal bill was unconstitutional and would be so declared, Republican senators from Virginia, Kentucky, Georgia, and North Carolina advanced the proposition that the courts did not possess the power.[7] Senator Breckenridge of Kentucky who led this movement said, "The legislature have the exclusive right to interpret the constitution in what regards the lawmaking power and the judges are bound to execute the laws they make."[8] This attitude on the part of Breckenridge and other Republicans seems to have come as a surprise, for the *National Intelligencer* said that his speech presented views "new and deeply interesting."[9]

Then came the case of Marbury v. Madison in which an act of Congress was declared unconstitutional and inapplicable. But instead of focussing attention on the use of this power, this famous decision really distracted attention from it, for at that time the interest lay in the conflict between Marshall and Jefferson—the court and the executive—and not in the conflicting powers of the judiciary

[3] *Ibid*, p. 479.
[4] Corwin, E. S., *Marshall and the Constitution*, (1920), p. 21 f.
[5] Corwin, E. S., *Doctrine of Judicial Review*, (1914), p. 55.
[6] *Annals of Congress*, 6th Congress, 1st Session, Mar. 5, 1800.
[7] *Ibid*, Senate Jan. 8 to Feb. 3, 1802; also House Feb. 16 to 20.
[8] *Ibid*, Senate Feb. 3, 1802, p. 178.
[9] *National Intelligencer*, Feb. 12, 1802.

and legislature.[10] Indeed, six months later, another congressional statute was declared unconstitutional by the circuit court for the District of Columbia,[11] and although the decision was published in full in the administration papers, it evoked no criticism of any kind.[12] Moreover, James Jackson had pointed out in Congress in the preceding year that there had already been one case of such action by the Supreme Court some time before.[13]

It was not until after 1820, in the conflict over the Bank of the United States, and the decision of the court in the case of McCulloch v. Maryland, that the earlier case of Marbury v. Madison was attacked because of its so-called "usurpation" of the power of judicial review. Then it was that those who opposed an increase of federal power became alarmed at its growth, and Jefferson began to realize that the power of the Federalist party was firmly intrenched in the doctrine of judicial review. From then on the court had no more hearty opponent than he.[14] In his early hostility to the court at the time of the case of Marbury v. Madison, however, it is clear that Jefferson's opposition was due solely to the fact that Marshall had sought to interfere with the function of the executive in making appointments.[15]

Again in 1832 the power of the Supreme Court was challenged, this time by Andrew Jackson. The occasion for this attack was the proposal to recharter the Bank of the United States. On this occasion he said, "It is maintained that the Bank's constitutionality is settled by the decision of the Supreme Court. To this I cannot assent. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges. The authority of the Supreme Court must . . . be allowed to have only such influence as the force of their reasoning deserves."[16] The background of this attack, like that of 1820, was the feeling that the federal judiciary was thoroughly in sympathy with the movement for creating a more centralized government. Only a year had elapsed since the controversy

[10] Cf. Beveridge, *Life of John Marshall.*

[11] U. S. v. Benjamin More, U. S. Circuit Court, D. C. Fall Term, 1803.

[12] *National Intelligencer*, Aug. 5, 1803.

[13] *Annals of Congress*, 7th Congress, 1st Session, Jan 12, 1802, apparently referring to Yale Todd case, 1794, concerning which the facts are uncertain—not completely reported in U. S. reports, mentioned in U. S. v. Fereira, 13 Howard 52 (1851).

[14] Ford, P. L., *Writings of Thomas Jefferson*, X, pp. 160, 169, 170, 171.

[15] *Ibid.*

[16] *Senate Journal*, July 1832, p. 451.

with Georgia over the Cherokee Indians, in which the Supreme Court had upheld a treaty with the Indians which seemed to the Georgians to infringe on their state-rights.[17] The criticism at this period seemed to be not so much of the power of judicial review as of the use made of it both to uphold and nullify laws in such a way as to strengthen the federal government.

Up to this point, then, we may draw two conclusions concerning the criticism of the Supreme Court: first, the court was criticised quite as much for not declaring congressional acts unconstitutional as for doing so; second, it seems clear that both Federalist and Republican criticism during these early years was directed not so much at the possession of the power of the court to pass on the validity of acts of Congress as at the effect of its exercise in supporting or invalidating some particular party measure.

The next period of criticism of the Supreme Court occurred just before and after the Civil War, when the court encountered the most bitter denunciation it had yet received; and again this was not because of the assertion of the power by the court but because the cases decided were matters of intense political controversy. On March 6, 1857 the court rendered its now famous decision in the Dred Scott case,[18] which held, among other points, that the Missouri Compromise, prohibiting slavery in the territories, was unconstitutional. Instead of settling the controversy over slavery this decision had just the opposite effect and brought wide condemnation on the court as well. The effect of the decision was weakened both by the patent purpose to settle a political question and by the disagreements of the judges.[19]

Admittedly the decision was popular in many sections, especially the south; but in the north we find such papers as the *New York Tribune* and the *Springfield Republican* bitterly opposing it as partisan and sectional.[20] Seward, voicing northern anti-slavery sentiment, said in the Senate, "The people of the United States never can, and they never will accept principles so unconstitutional and abhorrent.[21] The Republican Convention which nominated Abraham Lincoln for the presidency denounced the decision in a resolution, and Lincoln

[17] *Tassel v. Georgia*, 5 Peters 1.

[18] *Dred Scott v. Sandford*, 9 Howard 393.

[19] Smith, T. C., *Parties and Slavery*, (1906) p. 204 ff.

[20] *Springfield Republican*, Mar. 11, 1857; also Smith, p. 204, quoting *New York Tribune*, and other papers.

[21] *Congressional Globe*, 35th Congress, 1st Session, p. 943.

in his inaugural address made this statement: " . . . if the policy of the government is to be irrevocably fixed by decisions of the Supreme Court in ordinary litigation between parties . . . the people will have ceased to be their own rulers."[22] The Maine legislature passed a resolution stating that the Supreme Court should by peaceful measures be so reconstituted as to relieve it of a dominating sectional faction.[23] At about the same time the legislature of Massachusetts passed the following resolution: "While the people of Massachusetts recognize the judicial authority of the Supreme Court of the United States, in the determination of all questions properly coming before it, they will never consent that their rights shall be impaired or their liberties invaded by reason of any usurpation of political power by the said tribunal."[24] The same view was held by both Justice Curtis and Congressman John Sherman, who denounced the decision as the unnecessary decision of a political question under the guise of constitutional interpretation.[25] Thus it seems that the criticism of the Dred Scott decision was not a criticism of the power of judicial review, but of the attempted settlement of political questions by the Supreme Court.

During the Civil War, of course, public attention was directed toward winning the struggle and the activities of the court sank into the background. Immediately after the war, however, criticism revived, this time in connection with the reconstruction laws. The congressional debates of 1868 and 1869 are full of discussions of the relative powers of Congress and the judiciary over constitutional questions, and many proposals (to be discussed later) were made to curb the court's use of the power of judicial review. In the debates over these proposals Senator Drake of Missouri said, "The Courts, if unrestrained, will become a more formidable power than we are wont to suppose. . . . By such power a second veto power is set up more potent than that of the President because absolute—the power to veto not a bill, but a law;"[26] and Senator Edmunds of Vermont said that while he felt that the Supreme Court should continue to exercise the power of judicial review, yet he "desired to check the

[22] Nicholas and Hay, *Speeches and Letters of Abraham Lincoln* II, 5.

[23] *Senate Document* no. 14, 35th Congress, 1st Session.

[24] *Ibid.*

[25] Sherman, John, *Recollections of Forty Years in the House, Senate, and Cabinet* (1896); Haines C. G., *Conflict over Judicial Powers*, (1909), p. 148.

[26] *Congressional Globe*, 41st Congress, 2nd Session, p. 87 ff.

decision of political questions by the judiciary."[27] The fear was also expressed by Mr. Spaulding of Ohio in the House that under existing procedure, "one judge, in forming a majority of an equally divided court might by his voice render null and void the action of the entire Senate and House."[28]

Back of all these criticisms and proposals, however, was the fear that the court would declare the reconstruction acts invalid. The McCardle case[29] in which the constitutionality of these acts had been questioned, was still pending, and the radical Republicans were apprehensive of an adverse decision. Senator Drake frankly admitted this when he said, "There are now cases pending which call in question the constitutionality of acts of Congress passed in the exercise of some of its highest powers, such as . . . the powers of a military government over subjugated rebels, and it is gravely assumed that the court may pronounce the legislation of Congress on these great subjects void for unconstitutionality;"[30] while Mr. Hubbard of Connecticut said in the House, "Why this impetuous haste? Because it happens to be rumored that the Supreme Court are adverse to a particular measure passed by this body."[31] Thus we see that here again the criticism was based upon the political nature of the question involved rather than upon any unwarranted exercise of the judicial power by the court. Here, also, appears the now familiar criticism of bare majority, or so-called "one-man" decisions.

The McCardle case was disposed of by the passage of an act[32] by Congress withdrawing the Supreme Court's jurisdiction in such cases. But no sooner was this question out of the way than the Legal Tender cases brought on another storm of criticism. In 1870 the court declared by a vote of four to three (there being two vacancies at this time) that the act making United States notes legal tender was unconstitutional so far as it applied to debts contracted before the passage of the act.[33] The reasoning in this decision, however, was such as to imply that the law was also unconstitutional as applied to contracts entered into after its passage. This opinion was greeted in the

[27] *Ibid.*
[28] *Ibid*, 40th Congress, 2nd Session, pp. 479–80.
[29] Ex Parte McCardle, 6 Wall. 318, 7 Wall. 506.
[30] *Congressional Globe*, 41st Congress, 2nd Session, p. 87 ff.
[31] *Ibid*, 40th Congress, 2nd Session, pp. 479–80.
[32] *Ibid*, debates in House and Senate, Mar. 12, 14, and 25, 1868.
[33] Hepburn v. Griswold, 8 Wallace 603.

nation with emphatic expressions of disapproval because it would result in an increase in debts already contracted, since at that time gold was worth twenty per cent more than paper.[34] Shortly after this decision, two new justices were appointed to fill the vacancies then existing, and in another case (1871)[35] the court in effect reversed the previous decision. By a vote of five to four the validity of the Legal Tender acts was upheld under the war power.

A fair sample of criticism of this decision is found in the *Nation* which attacked it "first, because this sudden reversal of a former judgment, which had been maturely considered after a full argument, will weaken popular respect for all decisions of the court including this last one; second, because the rehearing of a cause, in consequence of the number of judges having increased, is for obvious reasons objectionable, where the number is dependent on the will of the very body whose acts the court has to review, and which in this case it is reviewing; and third, because the judges who have been added to the bench since the former decision are men who were at the bar when that decision was rendered, and were interested professionally and personally in having a different decision."[36]

The criticisms of the court in these cases, then, have chiefly to do with the part played by the exigencies of the occasion as opposed to the exposition of purely legal theory, and to the fact that the second decision rendered little more than a year after the first, disregarded the doctrine of *stare decisis* and reversed the first decision by the addition of the votes of two judges not present when the first decision was rendered. It is interesting to note also that from these criticisms the strictly partisan and sectional division between those who upheld and those who opposed the exercise of this power, noted in the earlier instances, was here absent. As Charles Warren, former assistant attorney-general of the United States, points out, "The singular spectacle was presented of strong adherents of national power opposing a judicial opinion which voiced most extreme limits of such power, and ardent advocates of a non-centralized government praising a decision which vastly increased the authority of the National government."[37]

[34] Hart, A. B., *Life and Letters of Salmon P. Chase*, (1899) p. 397.

[35] Knox v. Lee and Parker v. Davis, 12 Wallace 457.

[36] *Nation*, April 27, 1871.

[37] Warren, Charles, *The Supreme Court in United States History* (1923), III, p. 249 (hereafter cited as "Warren").

During the next twenty years, criticism was less bitter, and attention was focussed more closely on Congress than on the court, so that when the court decided in 1884[38] that Congress had power to reissue the legal tender notes in time of peace, under the power "universally understood to belong to sovereignty," although the court was censured for not declaring the act unconstitutional, the burden of the attack was directed at the legislature. In fact, the immediate result was the introduction in the House of resolutions to amend the constitution so as to prevent the issuance of legal tender notes.[39]

But the Legal Tender cases were not destined to mark the end of the dispute over the exercise of the judicial review. Barely ten years had elapsed when the whole question was reopened by the Income Tax decisions of 1895.[40] "At its first decision, on April 8, 1895, the court held a tax on real estate income unconstitutional, unless levied in the manner required for a direct tax; as to other income, the court was evenly divided, Judge Jackson being absent owing to illness. A reargument being ordered, a second decision was made May 20, in which Judge Jackson participated; but owing to the fact that Judge Shiras changed his mind after the first decision, the court, by a vote of five to four, held the whole tax invalid."[41]

This decision, made by a bare majority, like the Legal Tender cases, reversed the previous ruling of the same court upon a great question which was the center of a heated political controversy. This point was emphasized by E. B. Whitney, who was at that time assistant attorney-general and argued the case for the United States. In criticising the court for its decision he wrote at the time, "The Income Tax decision differs from the Legal Tender cases in that the decisions which it overruled were unanimous, and had long been acquiesced in. The court had in 1880 decided in Judge Springer's case, by a unanimous vote of the seven judges sitting, that an income tax essentially like the late one was a duty and not a direct tax, therefore valid. A similar ruling in 1868 had been made by the unanimous decision of the eight judges then forming the court, on the validity of a corporation income tax; and in these and other cases the court had said that the definitions had been substantially settled as early as the Hylton carriage case in 1796. . . . . Five judges now rule,

[38] Julliard v. Greenman, 110 U. S. 421.

[39] *Congressional Record*, 48th Congress, 1st Session, Mar. 10, 1884.

[40] Pollock v. Farmers Loan and Trust Co., 157 U. S. 429, 158 U. S. 601.

[41] Warren, *op. cit.*, II, p. 421.

however—and these five are entitled to speak for the court—that the seven judges of 1880, the eight of 1868, that Chief Justices Chase and Waite, and Associate Justices Nelson, Miller, Strong, Bradley, and the rest were all mistaken; and that an income tax is a direct tax and not a duty." In addition to its disregard of *stare decisis* the court was warmly attacked because of the so-called "one man" decision. On this point Whitney says again, "The court now by the casting vote of a single man reverses two unanimous decisions of many years standing and in effect overrules a series of unanimous decisions reaching back for a century."[42]

It should also be observed that the criticism arose, as in the Legal Tender cases, because the decision was based less on the legal evidence produced than on the economic consequences of such a law. On this point Professor Tiedeman of the University of New York said, "If a constitutional provision is susceptible of two constructions, one of which reflects the meaning and intent with which the written law was adopted, and the other reflects the prevalent sense of right and is demanded by a strong combination of private or public interests, the adoption by the court of the latter construction may be confidently predicted. . . . The real explanation of their attitude and the ignoring of *stare decisis* is their profound disbelief in the economic merits of the income tax law. . . . When public opinion . . . requires the written word to be ignored the court justly obeys the will of the popular mandate, at the same time keeping up a show of obedience to the written word by a skillful use of legal fictions."[43]

We see, then, that the Income Tax decisions were criticized on three grounds: first, because the decisions were based on economic theory rather than legal precedent; second, because of the ignoring of the doctrine of *stare decisis;* and third, because the decision was handed down by a bare majority.

Since 1900 the power of the Supreme Court to declare acts of Congress unconstitutional has been more steadily, consistently, and thoroughly questioned than in any other period in our history. The main cause of these recent criticisms is a series of decisions on questions of social justice which has aroused the ire of those who are seeking social

[42] Whitney, E. B., "Political Dangers of the Income Tax Decisions," *Forum*, XIX, (1895) p. 521 ff.

[43] Tiedeman, C. G., "Income Tax Decisions," *Annals of the American Academy*, VI, (1895), p. 268 ff.

reform.[44] The criticisms do not seem to arise, as they have previously, over single decisions, but attack instead the entire system.[45] "The courts are frankly the champions of the old order as against the new. . . . Their decisions are protecting special privilege and represent ideas of government and of law which are in conflict with the convictions of a majority of the people."[46] Here, again, we find the criticism made that the court reads its own political and economic beliefs into the Constitution. It is said that "the court seldom finds its judgments greatly restricted by the language of the instrument which is our formal fundamental law," but instead, "practically every interference with liberty or property may be a question under the due process clause of the Constitution and . . . due process is what the Supreme Court says it is."[47] It is also pointed out that the court in exercising the power of judicial review, is actually assuming the position of a third and supreme house of the legislature. In an article in the *Dearborn Independent*, Senator Edwin F. Ladd of North Dakota said, "The Supreme Court must not assume the attitude of believing that ultimate power rests in its hands, that it is not subject to review, that it is responsible only to the Constitution and that the Constitution is just what the court interprets it to be."[48]

Senator LaFollette of Wisconsin also pointed this out in an address to the American Federation of Labor convention, and later in the Senate, when he said, "The Supreme Court has departed from the position alloted to them by the founders of this government to interpret law and administer justice, and its members have become in a large measure a legislative body injecting their views into acts of Congress and modifying those acts by constructions in plain violation of the purpose and intent of Congress. . . . By a process of gradual encroachments, now confident and aggressive, sovereignty has been wrested from the people and usurped by the court. . . . Today the law is what they say it is, not what the people through Congress enact. Aye, even the Constitution of the United States is not what

[44] New York Bakeshop Case (198 U. S. 75), Employers' Liability Cases (207 U. S. 463), Compulsory Arbitration Law, Adair v. U. S. (208 U. S. 164), Child Labor Law, (247 U. S. 251) and others.

[45] For example, see *Nation*, CXV (1922), p. 653.

[46] Roe, G. E., *Our Judicial Obligarchy*, (1912), p. 22.

[47] Powell, T. R., "Supreme Court and the Constitution," *Political Science Quarterly*, XXV (1920) pp. 434, 439.

[48] *Dearborn Independent*, June 2, 1923.

its plain terms declare but what these nine men construe it to be."[49] And Congressman Frear of Wisconsin also said in the House, "When we read a pronouncement by the Supreme Court setting aside some law passed by Congress after months of study and debate by the two houses, or when amendments to the Constitution after ratification by three-fourths of the states are emasculated, we are prone to ask by what power is a man taken from the halls of Congress or from private life, given superhuman intelligence or infallible judgment when placed in a court room."[50]

The foregoing criticisms chiefly emphasize two points: first, that the court has been obstructing social progress by using its power of judicial review to declare laws invalid merely because of a disapproval of the policy of such legislation; and second, that by interpreting laws from their own point of view (and a very conservative one) the judges have become virtually the supreme law-makers of the nation as well as the supreme judges.

But even more has recent criticism been directed against the so-called "one man" decisions. In the same speech quoted above, Mr. Frear pointed out a number of close decisions on the question of the constitutionality of state and congressional statutes, among which are six instances where the constitutionality of important acts of Congress has been decided in a five to four decision. He says, in part, "Many laws, state and national, have been held constitutional by only one vote of the court, and other proportionately narrow escapes in determining the constitutionality are not cited, nor are ordinances of cities mentioned that were set aside or affirmed by a divided court decision, many of which I have before me." In a series of editorials beginning in 1920, the *New Republic* attacked this practice; and in 1923 Samuel Gompers, President of the American Federation of Labor, said in commenting on the minimum wage decision, "Five justices, a bare majority of one, have taken from the women and girl wage-earners, the protection that guaranteed them something approaching a fair wage and fair hours of work."[51] Senator Borah of Idaho also said, in an article in the *New York Times*, later reprinted in the *Congressional Record*, "In the last analysis it comes down to the proposition where one justice has the power to uphold or defeat the

[49] *Congressional Record*, 67th Congress, 2nd Session, June 1922, p. 9073 ff. quoting speech before A. F. of L.

[50] *Ibid*, 67th Congress, 4th Session, Jan. 27, 1923.

[51] *Springfield Republican*, April 11, 1923, quoting Gompers.

law; in a celebrated case [the income tax case] a change of view upon the part of one judge resulted in holding the law constitutional on one occasion and unconstitutional upon another."[52] Thus we see that the attack on "one man" decisions, which began to appear shortly after the Civil War and which became a real issue after the Income Tax decision, has been gaining strength in the past decade or two.

Having reviewed these various criticisms of the Supreme Court in its exercise of judicial review from its early days down to the present, certain facts become evident. First of all, we find that while partisan and sectional influence played a prominent part in the controversies over the early cases, the division in the later conflicts, beginning with the Legal Tender controversy, was on entirely different lines. We find that the condemnation of the court for its "one man" decisions did not appear until the McCardle case and did not become strong until the income tax dispute. We find that in the early cases, criticism was largely aimed at some particular decision, while more recently criticism is aimed at the entire system of judicial review. We find running through the entire history of the criticism, the objection that the judges decide cases in accordance with their own political or economic views rather than with pure legal theory and precedent, thus becoming in a way an upper house of the legislature rather than a court. Last of all, we find that present-day criticism is supported, not only by politicians and students of political science, but also by a considerable body of public opinion and by the great forces of organized labor as well.

These criticisms, however, serious as they are, should not be viewed with too great alarm. It should be remembered that in the entire history of the Supreme Court, a period of one hundred and thirty-four years, only about fifty decisions have been rendered in which acts of Congress have been declared unconstitutional. Of these fifty cases, only nine have been rendered by a bare majority. Furthermore, while there have been fifty cases of judicial nullification of congressional acts, only about a dozen of these have evoked anything more than casual criticism.[53] To be sure, it is said that these few have had unfortunate and far-reaching consequences, particularly the Dred Scott decision and the recent labor decisions. But it must also be remembered that the evil effects are talked about more and remembered

[52] *Congressional Record*, 67th Congress, 2nd Session, Feb. 19, 1922; *New York Times*, Feb. 18, 1922.

[53] Warren, Charles, "Borah, LaFollette, and the Supreme Court," *Saturday Evening Post*, Oct. 13, 1923, p. 31.

longer than the good; that the benefits derived from the exercise of this power may have been greater than the harm. But even granting this, it may be that the time has now come when the unrestricted exercise of the power of judicial review has become an anachronism. Or, it may be that the benefits derived from it can be increased and the harm decreased by a modification of that power. It is this possibility that brings us to a consideration of the various proposals that have been made at different times to modify the power of the Supreme Court to declare acts of Congress unconstitutional.

PROPOSALS FOR MODIFYING THE SUPREME COURT'S POWER

In the consideration of these proposals, we must endeavor to discover what kind and degree of modification, if any, will best provide for progressive action and at the same time safeguard the rights of minorities. With this in mind, let us first of all consider the proposal that the court be entirely deprived of its power to pass on the constitutionality of acts of Congress. At first, the opponents of judicial review did not think it necessary to propose legislation against it. They felt that the power did not exist, that the court was merely usurping it, and that mere denunciation of the court would prevent its further use. The action of the court in Marbury v. Madison and subsequent cases clearly showed, however, that more decisive action must be taken if the exercise of judicial review was to be stopped. In 1846, therefore, James Semple of Illinois introduced into the Senate a joint resolution proposing a constitutional amendment to prohibit the Supreme Court from declaring void "any act of Congress or any state regulation on the ground that it is contrary to the Constitution of the United States or of any particular state."[54] This proposal, however, died in the committee on judiciary.

Again, in 1869, Charles Sumner introduced a bill in the Senate which declared that "The judicial power extends only to cases between party and party . . . and does not include the President or Congress, or any of their acts . . . and all such acts are valid and conclusive on the matters to which they apply; . . . and no allegation or pretence of the invalidity thereof shall be excuse or defense for any neglect, refusal, or failure to perform any duty in regard to them."[55]

[54] *Congressional Globe*, 29th Congress, 2nd Session, Dec. 22, and 30, 1846 and Jan. 20, 1847.

[55] *Congressional Globe*, 41st Congress, 2nd Session, p. 2895 ff.

This bill was reported by the judiciary committee but was indefinitely postponed without debate. During the same session—and it should be remembered that this was the time when it was feared the reconstruction laws would be declared unconstitutional—Senator Drake of Missouri introduced a bill which provided that "No court . . . shall have power in any case to adjudge or hold any act or joint resolution of Congress invalid in whole or in part, for any supposed repugnancy between such act and the Constitution of the United States, or for any supposed want of authority in said Constitution for the same."[56] This bill provoked a short debate at its first introduction, but was never reported from the judiciary committee to which it was referred.

In addition to these attempts directly and completely to divest the court of its power of judicial review, there have been many instances in which this end has been sought by indirect means. These have included proposals for the withdrawal of jurisdiction over certain classes of cases, proposals for the limited term or legislative recall of federal judges, and proposals for the legislative review of decisions on constitutional questions. Let us first trace the development of these various proposals and then, since they all have been intended to place the ultimate decision of questions of constitutionality with Congress, let us consider the arguments for and against such action.

The demand for the withdrawal of jurisdiction was especially insistent during the reconstruction period following the Civil War. In March, 1867, Mr. Williams of Pennsylvania introduced a bill to "regulate the practice and define the power of the Supreme Court of the United States in certain cases arising under the Constitution and laws thereof,"[57] and later, in July of that same year, he introduced a joint resolution proposing an "amendment to the Constitution in regard to the judges of the supreme and other courts."[58] In 1868,[59] and again in 1869,[60] Senator Trumbull of Illinois, who was then chairman of the Senate committee on judiciary, reported a bill which was entitled "A bill to define the jurisdiction of the Supreme Court in certain cases." Now while the titles of these bills seem moderate enough, their real aim was to destroy the court's function of judicial review. A good example is the one last mentioned. It declared that

[56] *Congressional Globe*, 41st Congress, 2nd Session, p. 2.
[57] *Congressional Globe*, 40th Congress, 1st Session, p. 59.
[58] *Ibid*, p. 655.
[59] *Ibid*, 40th Congress, 2nd Session, pp. 1204, 1428, 1621.
[60] *Ibid*, 41st Congress, 2nd Session, pp. 3, 27, 45, 96, 152, 167 ff.

the reconstruction laws were "political in their character, the propriety or validity of which no judicial tribunal was competent to question," and it prohibited the Supreme Court "from entertaining jurisdiction of any case growing out of the execution of said Acts." It was by this means that the jurisdiction of the Supreme Court over the McCardle case was withdrawn. Proposals of this nature, however, seem to have been limited largely to the reconstruction period.

A method more often proposed has been that of limiting the term of office of the Supreme Court justices, or of making them subject to removal by Congress. Thus it was hoped to limit the use of this power by removing judges who exercised it. As early as 1802[61] Roger Griswold admitted the possibility of such action in the House of Representatives, and later Jefferson openly advocated such a means of curbing the Supreme Court's power. In a letter to Nathaniel Macon he said, " . . . we must check these unconstitutional invasions of state rights by the federal judiciary. How? not by impeachment in the first instance, but by a strong protestation of both houses of Congress that such and such doctrines advanced by the Supreme Court are contrary to the Constitution; and if afterward they relapse into the same heresies, impeach and set the whole adrift."[62] This plan had been tried in the case of Justice Chase, and immediately upon the failure of these impeachment proceedings, John Randolph moved in the House an amendment to the Constitution which would make federal judges removable by the President on the joint address of both houses of Congress without impeachment.[63]

Similar proposals were brought forward in 1806, 1811, and 1816, but failed to receive sufficient consideration for passage. In 1822, an editorial in the *Niles Register* approved a plan for six-year terms for federal judges with eligibility for reappointment by the President and both houses of Congress,[64] and in 1832 this proposal was presented on the floor of the House but was lost by a vote of 141 to 27.[65]

In 1896, Governor Pennoyer of Oregon wrote, "If Congress at the next session would impeach the nullifying judges for the usurpation of legislative power, remove them from office, and instruct the President

[61] *Annals of Congress*, 7th Congress, 1st Session, p. 783.

[62] Ford, P. L., *Writings of Thomas Jefferson*, X, 192.

[63] *Annals of Congress*, 9th Congress, 1st Session, pp. 446, 499; also Schouler, James, *History of the United States*, (1891) II, 87.

[64] Warren, II, 116, quoting *Niles Register* for June 22, 1822.

[65] *Congressional Debates*, v. VIII, part II, p. 1856—(1832).

to enforce the collection of the income tax, the Supreme Court would never hereafter presume to trench upon the exclusive powers of Congress."[66] Again in 1923, Representative Frear proposed that we should institute a system of judicial recall by the legislature.[67] Thus we see that from 1802 up to the present time the proposal has been made rather frequently to use the power of impeachment, or by some other method, to make judges removable who exercised the power of judicial review.

In order to make this process of removal easier and more effective, it was early proposed that the judges render their opinions *seriatim* according to the English custom.[68] Both Madison and Jefferson favored this plan. When at last the judges should be forced to announce their views *seriatim*, then it was Jefferson's plan that Congress should formally denounce such judicial views as it disagreed with, and then, if the judges failed to adopt the conclusions reached by Congress, impeachment should follow.[69]

In all these plans, the underlying motive can be seen to be the desire to place the court in a position where the act of declaring a congressional statute unconstitutional might result in the removal of the concurring judges. Thus it was hoped to make the court afraid to exercise their power in this field. These proposals, however, seem to have gained only a limited support.

A third method that has been proposed for making Congress the final authority in regard to the constitutionality of its acts, is that of allowing Congress to validate a law by repassing it after it has been declared unconstitutional by the court. The first concrete proposal of this kind in Congress was in a resolution introduced in 1821 by Senator Johnson of Kentucky which proposed an amendment to the Constitution providing that in cases to which a state "shall be a party and in all controversies in which a state may desire to become a party in consequence of having its laws or Constitution questioned, the Senate of the United States shall have appellate jurisdiction."[70] This idea

[66] Warren, III, 425, quoting Gov. Pennoyer.

[67] *Congressional Record*, 67 Cong. 4th Sess., Jan 27, 1923.

[68] Hunt, Gaillard, Madison's Writings, (1906–10) IX, 447 (letter to Roane, Sept. 1819); Ford, P. L., *Writings of Thomas Jefferson*, X, 223, (letter to Johnson, Oct. 1822).

[69] Ford, P. L., *Writings of Thomas Jefferson*, X, 192–3, (letter to Macon, Aug. 1821).

[70] *Annals of Congress*, 17th Congress, 1st Session, Dec. 12, 1821, Jan. 14 and 15, 1822.

probably had its origin in Madison's proposal in the Constitutional Convention that all acts before becoming laws be submitted to both the executive and the supreme judiciary; "If either objects, a two-thirds vote of the legislature shall be required; if both object, a three-fourths vote shall be required to overrule the objections and give the acts the force of law."[71] Although the move made by Johnson to constitute the Senate as a supreme appellate court was not pressed in Congress, it continued to be advocated for several years in the press and by public men, especially in New York by Governor DeWitt Clinton and some of the Democratic papers.[72] Strangely enough, Jefferson did not approve of this method: He said, "I doubt whether the erection of the Senate into an appellate court on constitutional questions would be deemed an unexceptional reliance."[73]

Recently a similar proposal has again been brought forward. On June 14, 1922, shortly after the court had handed down the minimum wage decision, Senator LaFollette of Wisconsin made a speech before the American Federation of Labor national convention, in which he proposed the following amendment to the Constitution:[74] "If the Supreme Court assumes to decide any law of Congress unconstitutional . . . the Congress may, by repassing the law, nullify the action of the court." Thereafter, the law would remain in full force and effect, precisely the same as though the court had never held it to be unconstitutional. He later added to this proposal the requirement that such a repassage should require a two-thirds vote in both houses.[75] On January 27, 1923, James A. Frear, representative from Wisconsin, introduced in the House a resolution to amend the Constitution, which embodied the LaFollette proposal.[76]

As has been noted, all the proposals thus far mentioned have as their object to make Congress the final authority on the constitutionality of its own acts. In support of this position we have noted in the first part of this paper the contention that the power of judicial review was never granted to the Supreme Court and that its exercise by that body was a usurpation. In addition, it has been pointed out

[71] McLaughlin, Dodd, Jernegan, Scott, *Source Problems in American History*, (1918) p. 167 ff. quoting the *Records of the Federal Convention*, II, 298.

[72] Warren, II, 121.

[73] Ford, P. L., *Writings of Thomas Jefferson*, X, 198.

[74] *Congressional Record*, 67th Congress, 2nd Session, p. 9073 Reprint of LaFollette's speech before A. F. of L.

[75] *Springfield Republican*, April 11, 1923.

[76] *Congressional Record*, 67th Congress, 4th Session, Jan. 27, 1923.

that the court in exercising this power has been accused of deciding constitutional points on the basis of its own economic or political philosophy. The contention is here raised that if the Constitution is to be interpreted in this manner, the interpretation would be more apt to be in accord with the times, if made by the legislature, elected by the people. Obviously, if Congress were made the final authority on constitutionality such criticisms as this from Senator LaFollette would be met: "Federal courts have thwarted the will of Congress and the people to protect children from exploitation. . . . This is typical of the conduct of the federal judges whenever Congress has sought to enact progressive and humane legislation which was offensive to great financial interests and enterprises. This decision [minimum wage] is merely the last of a long list . . . employers' liability statutes, arbitration acts, workmen's compensation, income tax laws and the shameful way in which the court rewrote and misapplied the anti-trust acts and the sixteenth amendment in the stock dividend cases."[77] This, indeed, is the chief argument for such restrictions as we have thus far considered.

As against this demand, the opponents of the plan to put final authority in the legislature base their chief argument on the contention that the legislature is subject to waves of temporary public opinion and, as such, in time of crisis it is apt to override the rights of minorities. The issue is stated very clearly by Governor Ritchie of Maryland: "The Constitution guarantees free speech, free press, free religion, life, liberty, property. Somebody must have the power to say whether a statute conforms to these guarantees. Which shall it be, Congress or the court?"[78] Concerning this Senator Shields of Tennessee says, "Without such power in the judiciary, the Constitution would be without vigor or life. . . . Congress could exercise all the powers of government, and the bill of rights would be subject to the whim, caprice, passion and political exigencies influencing temporary majorities of each succeeding Congress."[79] Charles Warren, former assistant attorney general, points out eleven cases since 1870 in which he claims this has been attempted by the legislature and checked by the court.[80] The opposition to making Congress the final interpreter of the Con-

[77] *Congressional Record*, 67th Congress, 2nd Session, p. 9073.

[78] *Congressional Digest*, June 1923, quoting Ritchie.

[79] *New York Times*, April 15, 1923, quoting Shields.

[80] Warren, Charles, "Borah, LaFollette and the Supreme Court" *Saturday Evening Post*, Oct. 13, 1923, p. 31 ff.

stitution was well summed up by Representative Hawes of Missouri in the House when he said that such a step "would:[81]

(1) destroy the balance of power between the Executive and the Legislature, since either the Legislature would legislate the Executive into impotency, or the Executive would dominate or ignore the Legislature;

(2) destroy the judicial check on both;

(3) leave the bill of rights without a special defender;

(4) remove all protection for the rights of the minority;

(5) place unlicensed and unlimited power in the hands of the majority;

(6) take from the government its fine conscience to determine right from wrong by a solemn tribunal unswayed by partisan heat or temporary excitement which punishes or rewards upon impulse created by passion or prejudice."

The above are but a few recent examples indicative of the type of arguments which have been advanced, ever since 1800, every time it has been proposed to make Congress in some way the final authority of the constitutionality of its own acts. Underlying all these arguments is, of course, the belief that the legislature is not as much to be trusted as the judiciary. There are two answers made to such arguments. It is first contended that the fear of a legislative despotism is more fancied than real since there cannot be found a single great government in Europe, whose legislature is not the judge of its own power,[82] but rather that this is the only great government where such unlimited power is reposed in the judiciary, or "in any man or group of men not subject to recall or review" by the people or their representatives.[83] It is contended, secondly, that while the legislature, if given such power could theoretically become despotic, it would not actually do so because the members of the legislature in contrast to the judiciary, must stand for reëlection at stated intervals.[84] Why, it is asked, should the court which is not subject to the will of the people be allowed to say that Congress, in passing a law, misconstrued the Constitution, while Congress which is subject to the will of the people cannot say that the court put a wrong construction upon it?[85]

[81] *Congressional Record*, 68th Congress, 1st Session, Dec. 28, 1923.

[82] *Congressional Digest*, June 1923 quoting W. W. Willoughby.

[83] *Congressional Record*, 67th Congress, 4th Session, Jan. 27, 1923, speech by Representative Frear, Wisconsin.

[84] Ladd, E. F. (U. S. Senator, North Dakota), article in the *Dearborn Independent*, June 2, 1923.

[85] *Congressional Globe*, 41st Congress, 2nd Session, p. 87 ff., speech by Senator Drake of Missouri.

These, then, are the principal arguments for and against any proposal to modify the power of the Supreme Court by making Congress the final authority on the constitutionality of its own acts. As yet, there has been no proposal for the recall of the judges or of decisions of the Supreme Court by a direct popular referendum. These methods have been proposed with regard to state courts,[86] but owing to the size of the country and the mechanical difficulty of carrying on such a referendum, this proposal has not as yet been advanced with reference to the Supreme Court.

There is another class of proposals that have been made to modify the power of the court to declare acts of Congress unconstitutional. These are proposals to require more than a simple majority of the court in order to make such a decision. The first instance of importance when this idea was advanced was in December, 1823, when Senator Johnson of Kentucky proposed a bill requiring the concurrence of all seven of the judges, in any opinion involving the validity of state statutes or acts of Congress.[87] By the next spring the sentiment had grown so that on March 11, 1824, the committee on judiciary reported a proposal that five out of the seven judges should be required to concur.[88] After some debate, this was laid on the table. In the House, similar proposals were introduced by Letcher and Metcalfe, both from Kentucky. At first these proposals were quite widely, though superficially, supported. Even Webster, though he later opposed the measure, seemed at first to see in it some good. He later introduced a counter proposal to the effect that "No judgment shall be pronounced until a majority of all the justices legally competent to judge the case shall concur in opinion, either in favor or against the validity thereof."[89]

Again, in 1867, the proposal came up. An early bill proposed that two-thirds of the entire court must concur in deciding adversely on the constitutionality of any law of the United States. The Senate committee on judiciary reported it back with a substitute amendment requiring five of the seven judges to constitute a quorum of the court, but not requiring more than a majority for a decision. In this form it passed the Senate on December 4, 1867.[90] In the House, the committee on judiciary reported it reinserting the proposal for a two-thirds

[86] Ransom, W. L., *Majority Rule and the Judiciary*, (1912).
[87] *Annals of Congress*, 18th Congress, 1st Session, Dec. 10, 1823.
[88] *Annals of Congress*, 18th Congress, 1st Session, Mar. 11, 1824.
[89] *Ibid*, May 4, 1824.
[90] *Congressional Globe*, 40th Congress, 2nd Session, p. 19.

vote. On January 13, 1868, the House rejected a proposal, made from the floor by Mr. Williams, for requiring a unanimous decision, but passed the bill as reported by the committee, by a vote of 116 to 39.[91] In the debate, the bill was warmly defended by men like Pruyn of New York, Marshall of Illinois, Woodard of Pennsylvania, and Spaulding and Bingham of Ohio. The country at large, however, did not take so kindly to the proposition and the less radical papers did not favor it.[92] When the bill was sent back to the Senate, it was postponed several times and finally died in committee.[93]

The recent dissatisfaction with the court has again brought forth the suggestion that more than a majority be required to declare a law unconstitutional. On April 11, 1921, Representative Hayden from Arizona introduced a resolution in the House calling for a constitutional amendment to the effect that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but two of the judges."[94] In January, 1922, John McSwain, representative from South Carolina, urged similar action.[95] In January, 1923, Representative Frear of Wisconsin proposed an amendment to the Constitution allowing Congress by law "to determine how many members of the Supreme Court shall join in any decision that declares unconstitutional, sets aside, or limits the effect of any federal or state law."[96] Again, in February of that same year, Senator Borah of Idaho proposed that a vote of seven to two be required;[97] Senator Fess of Ohio in March proposed a vote of not less than two-thirds;[98] and finally Senator Ladd of North Dakota in June proposed to allow only one dissenting judge.[99] Indeed, John H. Clarke, a former justice in the Supreme Court, has suggested, in an article in the *Journal of the American Bar Association*, that the court should voluntarily place on itself the requirement of a two-thirds majority.[100] Although a number of these late proposals have been

[91] *Ibid*, pp. 96, 478 ff, 489.

[92] Warren, III, 188–193.

[93] *Congressional Globe*, 40th Congress, 2nd Session, p. 503.

[94] *Congressional Record*, 66th Congress, 3rd Session, Apr. 11, 1921.

[95] *Ibid*, 67th Congress, 2nd Session, Jan. 5, 1922.

[96] *Ibid*, 67th Congress, 4th Session, Jan. 27, 1923.

[97] *Congressional Record*, 67th Congress, 4th Session, Feb. 5, 1923.

[98] *Congressional Digest*, June, 1923, quoting public letter of Senator Fess dated March 26, 1923.

[99] *Dearborn Independent*, June 2, 1923, article by Senator Ladd.

[100] *Chicago Tribune*, Nov. 22, 1923—summary of article by Clarke. See *Journal of Am. Bar. Assn.*

made in both houses of Congress, none of them has as yet been reported by the committee to which it has been referred.

The chief purpose of any proposal to modify the power of the Supreme Court, as pointed out above, was, without destroying the rights of the minority, to insure a more progressive interpretation of the constitution. The proposals for requiring a majority of more than one aim to do this by allowing the court to retain its power of judicial review, but requiring that it shall not exercise it by a bare majority. As has been pointed out by Senator Fess, "Each department is, in a way, a check upon the other two, but when the action of one directly affects the function of another, it cannot do it by a bare majority vote but, as is provided in specific cases (veto, impeachments, appointments, ratification of treaties, etc.) a two-thirds vote is required.[101]

The chief opposition to such proposals is the fact that they seem to give to a dissenting minority in the court the balance of power. This point was well stated by Frank W. Grinnell, secretary of the Massachusetts Bar Association, when he said, "This amendment proposes that a minority may prevent the Supreme Court from declaring a statute unconstitutional. If that be so, it in effect gives a minority of the court the power to declare a statute constitutional."[102] This argument is especially significant when it is remembered that the court has in the past been attacked nearly as often for declaring laws constitutional as unconstitutional. To this point the answer is made that, having passed Congress and having received the President's signature, a law is presumed to be constitutional, and if four out of the nine judges concur in this view, then the other five are actually a minority as opposed to nearly half the court, a majority of the legislature, and the executive.[103] It is further pointed out that the court "approaches the consideration of the constitutionality of a statute with the declared major premise that the act is presumed to be constitutional until found to be otherwise beyond a reasonable doubt;[104] yet in the face of this we find five members of the court holding acts unconstitutional while four members of the same court file vigorous and

[101] *Congressional Digest*, June, 1923, quoting Senator Fess in a letter, April 11, 1923.

[102] *Ibid*, quoting an article by Grinnell in the *Boston Globe* Feb. 11, 1923.

[103] *Congressional Record*, 67th Congress, 2nd Session, Feb. 19, 1922.

[104] *Congressional Record*, 67th Congress, 4th Session, Jan. 27, 1923, Representative Frear points out several cases in which this point has been emphasized in the opinions of the Supreme Court by such men as Marshall, Chase, Waite.

logical dissenting opinions."[105] These, in brief, are the arguments for and against requiring more than a majority vote to declare acts of Congress unconstitutional.

From a consideration of these proposals, we can see that while there has been no very concerted attempt entirely to deprive the court of its power of judicial review, there has been, nevertheless, an ever-recurring demand that some modification shall be made. The proposals for modification have been of two classes: first, those which aim to allow Congress ultimately to judge its own constitutional powers; and secondly, those which aim to require more than a majority vote of the court. The first class is attacked on the grounds that it destroys the balance of the governmental departments by giving the legislature too great power. The second class is attacked on the grounds that it allows a minority of the court to overrule the majority. On the other hand, some modification is being demanded on the ground that under the present system the court has too great power, and that its decisions are retarding progress to such an extent as to seem almost reactionary.

It is extremely unwise, as a rule, to overthrow an institution which has worked as a whole so admirably as the American system of judicial review. Originating in the early years of our government, this practice has survived the heat of political controversies and civil war. With the record which the court has, there is a presumption that, if left alone, it will adjust itself to new conditions, perhaps in the manner suggested by former Justice Clarke. If the court voluntarily adopts a more progressive attitude, the problem will be solved. If it does not, then some form of modification will probably be adopted.

[105] *Ibid*, 2nd Session, Jan. 6, 1922.

SIMPLIFIED PROCEDURE IN MUNICIPAL COURTS

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American democracy is not combating crime successfully. We are given the unenviable distinction of leading the civilized world in murder, robbery, burglary and other of the graver crimes against person and property.[1] As a nation we have a disconcertingly high criminal ratio and in our large cities, where the opportunities and temptations for crime are greater, constantly recurring crime waves threaten our social organization.

The administration of justice is a state function. Police officers are technically state officials and justices of the peace, police and municipal courts are performing state functions, yet it nevertheless is true that the prevention, detection and treatment of crime and criminals are of special importance to city dwellers and under our decentralized administration of justice the city ought to feel its responsibility and be given the opportunity to deal with the problem in an intelligent manner.

It has been estimated that in Cleveland, Ohio, two-thirds of those who commit serious crimes are never arrested, and of the one-third arrested two-thirds are never convicted.[2] The administration of criminal law has been declared a failure in Cleveland[3] but few of our other large cities have any special reason for self-congratulation. Our criminal statistics in general are very unreliable and inadequate. The census bureau has been making an ambitious attempt at securing

[1] Report of the Special Committee on Law Enforcement, 47 *Report of the Am. Bar Association (1922)*, 428.

[2] *First Quarterly Bulletin for the Quarter ended March 31, 1923*, the Cleveland Association for Criminal Justice, p. 10.

[3] Criminal Justice in Cleveland, *Report of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (1922) p. 229.

criminal statistics but has found it difficult and at times impossible to secure even the simplest data.[4]

Our institutions for the administration of justice must properly balance individual liberty and social control. During the early development of our constitutional government many safeguards were thrown around the individual accused of crime. In early English history the machinery of justice was frequently used by the state to oppress the individual, and what are today regarded as minor offences were punishable by death. This led courts to build up many technical safeguards around the man charged with crime.[5] Viewed historically, there may be found good reason for practically all of the bewildering maze of procedure which is unfolded as the prosecuting officer and the resourceful attorney for the defence fight out their long-protracted legal battle. Many anachronisms are met with; some are harmless survivals, others may tend to impede justice, but many features, though antiquated in appearance, have proved their worth through the test of time.[6]

The grand jury has long been considered an important factor in our judicial system. Today ten of our state constitutions have no provision requiring grand-jury indictments.[7] The statutes of these states, however, require or permit grand juries. Seven constitutions permit the legislature to abolish or change the grand-jury system.[8] Ten constitutions provide that cases may be prosecuted by information as well as by indictment.[9] Eleven states have by law or constitution retained the grand jury for occasional use.[10]

It is doubtful if the grand jury answers any useful purpose under metropolitan conditions. Those who favor its discontinuance insist

[4] S. B. Warner, The New Federal Census, 14 *Journal of the American Institute of Criminal Law and Criminology* (May, 1923) pp. 79–90. J. A. Hill, Cooperation between state and municipal Bureaus and the Federal Census Board in the compilation of statistics, *Ibid*, XII, 529.

[5] Harlan F. Stone, *Law and its Administration*, p. 115.

[6] Roscoe Pound, Anachronisms in Law. 3 *Journal of the American Judicature Society*, p. 142.

[7] Ga., Kans., Md., Mass., Mich., Minn., N. H., Vt., Va., and Wis. Ill. Constitutional Convention (1920) *Bulletin No. 10*, p. 833.

[8] Colo., Neb., N. Dak., Wyo., Ia., Ill., Ind. *Index Digest of State Constitutions*, The N. Y. State Constitutional Convention Commission, 1915, p. 502.

[9] Ariz., Calif., Ida., Mo., Mont., Nev., Okla., S. Dak., Utah, Wash. *Ibid*, pp. 502–503.

[10] Ariz., Calif., Ida., Kans., Mich., Mo., Mont., Nev., Okla., S. Dak., Utah, Wash., Ill. Const. Conv. *Bulletin No. 10*, pp. 834–835.

that in most cases the grand jury can not possibly do any good but may always do harm.[11] The ordinary urban grand jury tends to become a rubber stamp for the prosecutor.[12] The special grand jury ought to be retained to act where powerful individuals or interests are involved or where the prosecutor for some reason is hesitant. A preliminary hearing before a court on information will in most cases be more satisfactory and is, as a matter of fact, the method now employed in a number of states.

The petit jury is the central feature of our criminal court procedure. Its essential features have been adopted in many foreign countries and are not likely to be discarded by us, but we may learn a good deal from English and Canadian experience in its use.

It has often been said that it is better for 99 guilty to go free than for one innocent person to be punished. This emphasizes the individualistic point of view. Society today, confronted with crime and general lawlessness, will find it necessary to devise some more effective means of securing the conviction of the 99 without jeopardizing the innocent, or may in desperation decide that the incarceration of a larger part of the 99 guilty may be worth the sacrifice of the one innocent. Society must protect itself from the continued depredations of the 99.

In the municipal court of Chicago and the recorder's court of Detroit we find two new developments that make for fewer technicalities and greater efficiency. In the first place these courts are unified. The recorder's court of Detroit is the only completely unified criminal court in the United States.[13] In Chicago the municipal court succeeded to the criminal jurisdiction of the former justices of the peace, and was given some additional powers along other lines. Within this limited field it is united and organized under a chief justice who has power to assign judges and to control the dockets. Through the exercise of these powers he can create new courts for special purposes, but all such courts remain under central supervision. The Detroit court has no permanent chief justice, the judges serving in rotation.

In the second place, these courts are given certain rule-making powers. Rules of procedure, to provide for the orderly dispatch of

[11] Herbert Harley, Criminal Justice, How to Achieve It. *Suppl. to the Nat. Mun. Review*, Mar., 1922, p. 19; Grand Jury Reform, 4 *Journal A. J. S.*, 77.

[12] Criminal Justice in Cleveland, p. 212.

[13] An Appraisal of the Recorders' Court of Detroit during its second year 1921–22. *Public Business (Detroit) No. 72*, Aug. 1, 1922, p. 3.

business, the saving of public time and the maintenance of the dignity of the court, ought to be distinguished from rules intended to safeguard the accused and to give him a fair trial.[14] The former ought certainly, without serious limitations, to be placed within reasonable court discretion. Every man's substantive rights should be fully safeguarded, but no man should be deemed to have a vested right in any procedural rule that would thwart justice. If procedure with proper limitations were placed under the control of an enlightened bench, it would not become more technical and arbitrary than at present, where chance and human intent may at so many points conspire to defeat the orderly course of justice. In Illinois the supreme court has upheld the exercise of rule-making power by the Chicago municipal court.[15]

It is not justice in the abstract that we are seeking through our court proceedings. What justice is it? It may be true, as Dean J. H. Wigmore says, that civilian criminal justice does not know what it wants and much less does it resolutely go in and get anything.[16] Both law and procedure are fundamentally based on psychology, and radical changes in psychological beliefs will have a profound significance for both. The common law, for instance, is very much concerned with certain mental processes such as knowing, willing, intent; but with the behavioristic psychology to the fore we may be less certain than our fore-fathers as to basis of both substantive and adjective law.[17] We may not yet be prepared to substitute social clinics for courts and yet we have changed our attitude toward certain of our law-breakers in recent years.

We find in the juvenile court, beginning in Chicago in 1899,[18] one of the first serious modifications in court procedure. These courts, to be sure, deal only with children but within their field they are revolutionary. Children brought before them are theoretically not on trial. It is rather a hearing or inquest for their benefit. We find

[14] Committee Report, 1 *Journal Am. Inst., of C. L. and C.*, p. 584.

[15] Chicago v. Coleman, 254 Ill., 338. List of 35 Rules, as amended and adopted May 25, 1922, are found in the *15th Annual Report of the Municipal Court of Chicago*, pp. 102–114.

[16] J. H. Wigmore, Some Lessons for Civilian Justice to be Learned from Military Justice. 10 *Journal Am. Inst., of C. L. and C.*, p. 170.

[17] J. H. T. Malan, The Behavioristic Basis of the Science of Law, 8 *American Bar Association Journal*, p. 737.

[18] Evelena Belden, Courts in the United States having Children's Cases. U. S. Department of Labor, *Children's Bureau Publication No. 65.*

here new practices as to summons, detention, hearing, evidence, judgment and disposition. The court does not determine "guilty" or "not guilty" as to specifically alleged acts, but aims rather to discover if the child is in need of special state care.

On the whole, the new informal procedure in juvenile cases is making rapid progress and the courts are reaching out to influence home environment. In Chicago the municipal court has a branch known as the boys' court for boys between the ages of seventeen and twenty-one. When a felony is charged the defendant must be held to await the action of the grand jury, but in other cases the boys' court assumes jurisdiction and uses informal procedure.[19]

But if children and even boys from seventeen to twenty-one as in Chicago are to be accorded special treatment, why not others? How many so-called criminals are in fact mentally deficient and irresponsible? To determine this question a psychological laboratory was established in connection with the Chicago municipal court in 1914 and as a result over one thousand are annually committed to asylums.[20]

The Detroit recorder's court, a unified criminal court dating from April, 1920, has shown itself efficient, vigorous and progressive.[21] It also has a psychopathic department to give social, mental, and physical examinations.[22] The director of the clinic has no power to dispose of any offender, but the judge, with the information supplied him by the psychiatrist, can presumably deal a little more intelligently with the offender even though still handicapped under existing laws.[23]

Taking into account the experience of Chicago, Detroit and other cities, it seems evident that the psychiatric clinic must be destined to become a part of the judicial system of every large city, and as further advances in psychiatry are made, the findings of the psychiatrist will become more and more determining in all cases where there may be doubt as to the mental and moral capacity of the accused, and "jury trial" will in such cases undoubtedly be replaced by pro-

[19] *Fifteenth Annual Report of the Municipal Court of Chicago*, p. 115.

[20] See 7 *Journal of the A. J. S. No. 2*, Aug. 1923.

[21] Detroit Solves Crime Problem through Unified Court. *Ibid.* 4, 189.

[22] Pliny W. Marsh, Detroit Succeeds under New Organization. 14 *Journal, Am. Inst. of C. L. and C.*, pp. 79–90.

[23] An Appraisal of the Recorder's Court of Detroit during its second year 1921–22, *Public Business, No. 72*, Aug. 1, 1922, pp. 6–11.

phylactic measures as a part of the new science of social hygiene.[24] Many of the so-called alienists who have testified in cases where insanity is pleaded have done much to discredit their profession with the public, and many people will be skeptical about the merits of a procedure that would regularly employ the services of alienists, psychiatrists and other experts.[25] But whatever the abuses of the past, our courts must be prepared to have scientific problems solved in a scientific way.

In cases involving children, the intellectually subnormal, the morally deficient and the insane, the older technical rules of procedure are being supplanted by a new type of procedure, and there are many who feel that the conventional procedure must eventually yield along other lines to meet newer social and psychological theories.

It is highly essential in a civilized state that justice be administered through its criminal courts. It is almost equally important that private wrongs should be prevented or redressed in the civil courts. King John's pledge in Magna Charta: "To none will we sell, to none deny or delay, right or justice,"[26] should apply to both civil and criminal courts. Civil procedure at common law was even more technical than criminal procedure but has been subjected to greater changes. The old pleadings, declaration, plea, replication, rebutter, surrebutter, rejoinder, and surrejoinder, with flanking demurrers and what not, before the case really could be tried before a jury, have in large part given way to simpler procedure, but do not yet satisfy modern demands for immediate, certain and inexpensive justice. The modern city with its heterogeneous population, its conflicting self-seeking interests and complicated interrelationships calls stridently for justice administered in ways more in keeping with modern life. So conservative a public leader as Elihu Root joins in a demand for a revolution in judicial procedure.[27]

[24] Herman M. Adler, The Interests of Psychiatry in Criminal Procedure. 47 *Report of the American Bar Association*, pp. 629–633. Alfred Gordon, Medico-Legal Aspect of Morbid Impulses. 12 *Journal Am. Inst. of C. L. and C.*, pp. 604–616. Robert H. Gault, Facilities for Medical Psychiatric Examinations in Courts. *Ibid*, pp. 6–8. Louise Stevens Bryant, A Department of Diagnosis and Treatment for a Municipal Court. *Ibid*, 198–206. H. H. Goddard, *The Criminal Imbecile.*

[25] John F. W. Meagher, Crime and Insanity, 14 *Journal Am. Inst. of C. L. and C.*, pp. 46–61. L. Vernon Briggs, Medico-Legal Insanity and the Hypothetical Question. *Ibid*, pp. 62–74. William A. White, Expert Testimony. *Ibid*, 11, pp. 499–511.

[26] *Magna Charta*, cap. 40.

[27] Elihu Root, *Addresses on Government and Citizenship*, p. 434.

Legislatures, ill-prepared for their tasks, have felt called upon to enact an enormous amount of legislation to meet new and changing social and industrial conditions. In so far as these laws have been imperfectly drawn, or have been ill-adapted to their purposes, it has imposed a correspondingly heavy task on the courts. Among other things the legislatures have attempted reforms in judicial procedure but in most cases with no marked success. In both code states and common-law states, procedure has continued complicated, technical and bewildering. Of course "there is no method, either legislative or otherwise, whereby procedure may be rendered simple and effective in the hands of the practitioner too lazy or indifferent or incompetent to master the art of bringing his case into court and trying it in a simple, direct and concise manner."[28] Judges too must be thoroughly prepared for their duties. In connection with procedural reforms, the bar associations, national, state and local, have in recent years tried to secure and maintain higher standards for both bar and bench.

Jury trial prevails in civil as well as in criminal cases, being guaranteed by the constitutions of all states except Louisiana and Utah.[29] A less than unanimous verdict is, however, provided for or permitted in eighteen states in civil cases in courts of record.[30] The civil-case jury is in many states smaller than the conventional twelve, and in some states waivers of jury trials are encouraged.[31]

When it comes to presenting evidence to the jury the layman is impressed with the obstacles which are apparently placed in the way of witnesses telling their stories in a straightforward manner.[32] It takes a skillful lawyer to get all his evidence before a jury properly.

Many short practice acts have been enacted to simplify procedure. In 1921 New York put into operation a new civil practice act which reflects present tendencies. Much of the existing system was retained because through litigation its construction was known. Even so, 650 decisions relating to this act and to its attendant rules of civil procedure appeared in the *New York Law Journal* during the first eight months.[33] The act eliminated unnecessary motions, abolished

[28] Harlan F. Stone, *Law and its Administration*, p. 121.

[29] *Ill. Const. Conv. Bulletin No. 10*, p. 843.

[30] *Ibid.*, p. 843.

[31] *Ibid.*, p. 844. *Index Digest of State Constitutions*, N. Y. State Const. Conv. Comn. 1915, pp. 803–806.

[32] Root, *Addresses*, p. 421, quoting Hilton v. Guyot 42 Fed. Rep. 249, 253.

[33] H. R. Medina, *Imported Feature of Pleading and Practice under the New York Civil Practice Act*, Introd.p. IV.

the demurrer and numerous writs, corrected other undesirable features of the old system, and transferred many details of practice to rules. Court rules, numbering less than 300, were framed by a convention of judges and trial lawyers. They were formally adopted and went into effect with the act.[34] Under Rule 113 provision is made for summary judgment where a defendant fails by affidavit or other proof to show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend. The application of this rule has been upheld by the courts.[35]

The New Jersey Practice Act of 1912 permits judges to make rules and also authorizes them to relax and dispense with rules wherever strict adherence would work surprise or injustice.[36] Short-practice acts try to shorten and simplify procedure, but frequently the simplification is in nomenclature rather than in procedure.

The need for procedural reform is becoming more and more acute in our cities. When a city finds itself with a half a dozen different and often specialized courts, with little coördination and overlapping jurisdictions, the situation becomes intolerable. Lawyers with the best of intentions will at times flounder, but with ulterior motives they multiply confusion.

In Chicago, where the municipal court has been given rule-making powers, simplified procedure has become possible. The judges have departed radically from the common-law pleadings. The plaintiff must present a brief, concise statement of his claim supported by an affidavit. All admissions or denials by the defendant must be direct and specific.[37] Every year thousands of causes are determined by default because the defendant has not dared to file such an affidavit of merits.[38] Only matters actually in dispute will be tried in court. The rules of evidence, however, remain unchanged.

The conciliation branch of the municipal court of Cleveland, Ohio, was established in 1913. Cases involving less than $35 will on request of the plaintiff be tried in this court. If the case does not prove adapted to informal procedure the judge can transfer it to the regular trial

[34] Harry M. Ingram, New System of Civil Practice in New York 7 *Am. Bar Assoc.*, 402–3.

[35] General Investment Co. v. Interborough Rapid Transit Co., 235 *N. Y. Rep.* 133 (1923).

[36] Martin Conboy, The Working of the New Jersey Short Practice Act, 73 *Annals of the American Academy of Social and Political Science*, 172.

[37] Rule 15. *The Fifteenth Annual Report of the Mun. Ct. of Chicago*, p. 105.

[38] Success of Organized Courts 1 *Journal of A. J. S.*, p. 140.

court. The procedure is so simple that no pleadings are required, and the court at times exercises wide equity powers. The judge can actually dispose of cases at the rate of one hundred a day.[39]

In Chicago the chief justice established a small claim branch which, now exercises jurisdiction up to $200. The court is prepared to furnish immediate jury service if a jury trial should be demanded.

The small debtors' courts of several Kansas cities have even more informal procedure. The judge need not be a lawyer, and "court" can be held anywhere in almost any way. They are independent courts, without administrative supervision, furnishing a rough and ready justice for the poor, in cases under $20.[40] Portland, Oregon, copied the Kansas plan but improved considerably on its model.

Small-claims courts reduce the expense of litigation mainly by making the work of the attorney superfluous. Individual cities such as Kansas City, Cleveland, Portland, Chicago, Minneapolis and Philadelphia have set up such courts. Massachusetts was the first state to establish small-claims sessions in all the lower courts throughout the state.[41]

Conciliation courts differ from small-claims courts in that their awards are in no way binding on the disputing parties. Conciliation is not necessarily associated with the courts. Every high-minded lawyer will attempt to reach a settlement out of court through some such process. The modern conciliation court originated in Denmark and Norway over a century ago. The law in these countries requires an attempt at conciliation before the ordinary courts of law may assume jurisdiction. The plan has proved very successful, particularly outside of the capital cities. In the larger cities there is a tendency for lawyers to consider conciliation as an unavoidable formality antecedent to court procedure.[42] Denmark has modified her conciliation laws somewhat for Copenhagen.[43]

In the United States, between 1846 and 1851, five states[44] made constitutional provision for conciliation. A sixth state, North Dakota, followed suit in 1889. Nothing came from this earlier movement.

[39] R. H. Smith, *Justice and the Poor*, p. 51.

[40] *Ibid.*, p. 43.

[41] *Laws of Mass. 1920*, Ch. 553; 4 *Journal of the A. J. S.*, 51.

[42] Interview with Höieste Rets Advokat Emil Stang, Christiania, June 19, 1914.

[43] George H. Ostenfeld, Danish Courts of Conciliation 9 *Am. Bar Assoc. Journal* (Nov., 1923), p. 747.

[44] N. Y., 1846; Wis. 1847; Mich. 1850; Ohio 1851; Ind. 1851.

Ten years ago considerable interest was aroused through the adoption of certain conciliation features in the municipal court of Cleveland. In the conciliation branch, already described, the judge tries to affect an amicable adjustment of differences after an informal attempt to ascertain the facts,[45] but if conciliation fails the court can proceed to judgment subject to the limits of its jurisdiction. As a matter of fact, a large number of disputes are conciliated by the clerk without even being placed on the docket. Even after docketing the parties are given an opportunity to settle, and if agreement is reached the appropriate entry is made.[46]

The Minneapolis court of conciliation, a branch of the municipal court, was created by law in 1917.[47] Its jurisdiction extends to causes not exceeding $1,000. If the disputants come to a voluntary agreement, this agreement, when entered and countersigned by the judge, has the force of a judgment. If conciliation fails in cases involving $75 or less,[48] the court immediately proceeds to a hearing and renders judgment.[49] The Minnesota State Bar Association was active in promoting the conciliation act of 1917. Since then conciliation courts have been set up in Stillwater[50] and St. Paul,[51] and, in 1921, city councils in all cities of Minnesota were authorized to establish conciliation branch courts.[52]

Beginning in 1917, in the conciliation and arbitration departments of the municipal court of the city of New York, conciliation procedure is available to the full extent of the municipal court's jurisdiction.[53] No judgment is entered and it rests with the parties to live up to their agreement.[54]

[45] Manuel Levine, The Conciliation Court of Cleveland. 2 *Journal A. J. S.*, p. 11.

[46] Letter from W. F. Burke, Chief Clerk of the Conciliation Branch of the Municipal Court of Cleveland, dated Nov. 21, 1923. See *Rules of the Municipal Court of Cleveland*, Conciliation Branch, Rule 3.

[47] *Laws of Minn.* 1917, Ch. 263.

[48] *Ibid.*, 1923, Ch. 262.

[49] Manuel Levine, Minneapolis Conciliation Court, 2 *Journal A. J. S.*, 17.

[50] *Laws of Minn.* 1919, Ch. 112.

[51] *Ibid.*, 1921. Ch. 525.

[52] *Ibid.*, 1921. Ch. 317.

[53] *Laws of N. Y.* 1915, Ch. 279.

[54] Informal Procedure in New York, 2 *Journal of the A. J. S.*, 26-27. Edgar J. Lauer, Conciliation and Arbitration in the Municipal Court of the City of N. Y. *Ibid. I*, 153.

By an act approved March 10, 1921, North Dakota provided for a compulsory state-wide use of conciliation in most cases under $200 before ordinary court proceedings can begin. The conciliation system is under the control and supervision of the district court judges.[55] The success of the plan will depend largely on the sympathetic attitude of these judges. The law has been sustained by the state supreme court.[56]

In Iowa the district, superior and municipal court judges are authorized by law, at their discretion, to provide for conciliation and to adopt and enforce rules prescribing the conciliation procedure.[57] In minor cases the judges themselves will, if practicable, try to affect settlement through conciliation or arbitration.[58]

Conciliation is frequently used with success in domestic relations or family courts. When the courts are properly unified, this branch or session can be given broad powers that combine equity, criminal and civil court features, and can thereby become more efficient in restoring proper family relationships.

Another plan for settling disputes without formal court intervention is by arbitration. Arbitration is generally found provided for in courts of conciliation. There is no reason why the bulk of business disputes should not be settled in this manner without "technical rules of procedure," reaching a "decision according to the justice and the reason of the case."[59] The plan has for a long time been popular in England and in Europe. The chamber of commerce of the state of New York has from the time of its organization in 1768 sponsored the plan, but till recently with no great success.[60] In April, 1917, the municipal court of the city of New York made possible by rule the submission of disputes to an agreed arbitrator, but, until the legislature in 1920 enacted a law[61] making agreements to arbitrate irrev-

[55] Laws of N. Dak., 1921, Ch. 38; R. H. Smith, The Place of Conciliation in the Administration of Justice. *Am. Bar Assoc. Journal*, Nov., 1923.

[56] Klein v. Hutton, 191 *N. W. Rep. 485* (1922).

[57] *Laws of Iowa*, 1923 (40 G. A.) Ch. 265.

[58] *Ibid.*, S 4.

[59] J. H. Cohen, *Handbook for Arbitrators*, published by the Chamber of Commerce of the State of New York, p. 57.

[60] *Report of the Special Committee on Commercial Arbitration, 1911*, The Chamber of Commerce of the State of New York, p. 5.

[61] *Laws of New York*, 1920, Ch. 275.

ocable, the agreement was not legally binding.[62] The New York state court of appeals has sustained this act.[63] Arbitration agreements are getting more common throughout the country.

Business men settle a great number of disputes among themselves in this manner, and it is common for employers and employees to enter into similar agreements.[64] Besides the ordinary voluntary agreements to arbitrate, most states of the union provide for arbitration and mediation in some form in their labor legislation.[65]

In Chicago the situation is unique in that the chief justice of the municipal court has designated a special judge for the arbitration branch, to whom questions of law can be referred at any time during arbitration proceedings.[66] This creates what would appear to be an ideal situation, for questions of fact can then be decided by men who know business, and legal matters by a judge who knows law.

Informal procedure has established itself in courts dealing with children and the mentally incompetent, and with some phases of domestic relations. State legislatures are struggling to simplify procedure but are reluctant to yield rule-making powers to the courts. Perhaps until courts can be unified and put on a higher plane they could do no better. There is one form of simplified procedure that should no longer be tolerated—the procedure or lack of procedure in the average municipal police court and other minor courts not of record. There should be no "inferior" courts.

In the business world substantive law has lagged behind industrial development. In regulating industrial relations, the government has set up boards and commissions in different fields and given them quasi-judicial functions, for instance railroad and public-utility commissions, workmen's compensation boards and the like. Business disputes are mostly settled out of court either through attorneys or through voluntary arbitration proceedings. More or less successful attempts have been made in simplifying civil procedure but again the legislatures have been reluctant to give over to courts procedural

[62] New Act Puts Teeth in Arbitration Law. 4 *Journal A. J. S., 54.*

[63] Berkowitz v. Arbib and Houlberg, 230 *N. Y. Rep. 261 (1921).*

[64] See for ex. Earl Dean Howard, *The Hart, Schaffner and Marx Labor Agreement (1920).*

[65] U. S. Department of Labor, *Bulletin of the U. S. Bureau of Labor Statistics No. 330,* Cumulative Index, p. 53.

[66] 3 *American Bar Association Journal,* p. 21.

control. Informal procedure is gaining ground in small claims and conciliation courts, where usually only small amounts are involved. Most states are still at some appreciable distance from the ideal of certain, speedy and inexpensive justice for all.

LEGISLATIVE NOTES AND REVIEWS

EDITED BY WALTER F. DODD

State Police Developments: 1921–1924.[1] Recent progress in the state police movement has been marked more by the improvement of existing systems and agitation for newly-created organizations than by the actual inauguration of such institutions. In the matter of reorganization and improvement, the greatest advancement was realized in Connecticut, New York, Colorado and Idaho; while New Jersey, the sixteenth state to maintain a state police organization,[2] established an entirely new system. In other states, governors' messages and other official recommendations for state police plans indicate widespread interest in this matter.

The principal positive factors involved in these developments seem to have been: (1) the use of the automobile in criminal activities conducted on state-wide and interstate lines, and the consequent inability of local peace officers to isolate crime waves; (2) the desire to prevent riot and violence in connection with industrial troubles; (3) the need of traffic regulation in rural communities, especially on trans-state boulevards; (4) recognition of the efficiency of small mobile police organizations on active duty continually; (5) appreciation of the efficiency of state safety organizations in war-time; and (6) tendencies toward coöperation among the several departments of the state government and with local governments, and between the states and national governments, in the prevention and detection of crime.

Obstacles to the creation and development of state police included the contentions: (1) that it would constitute an added expense to the state and consequently increase the taxes; (2) that it would be an infringement upon the province of local government; (3) that it would

[1] See note on this subject in 15 *American Political Science Review*, 82 (February, 1921). On state police legislation and the supreme court see article by E. M. Borchard in 33 *Yale Law Journal*, 847 (June, 1924).

[2] Massachusetts, Connecticut, Texas, Arizona, New Mexico, Pennsylvania, New York, New Jersey, Michigan, Alabama, South Carolina, Tennessee, Idaho, South Dakota, California and Wyoming.

be a step toward militarism within the state; and (4) that it would be prejudicial to personal liberty.

Statutes. Arguments adverse to the state police idea were of no avail in Connecticut, as the 1921 Legislature amended their act of two years before so as to require the superintendent of state police to establish police patrols throughout the entire state "exclusive of cities and boroughs, whose duty it shall be to endeavor to prevent the commission of crime," as well as to apprehend offenders. The superintendent was further required to "assume such duties of the commissioner of motor vehicles as relate to the prevention, investigation and detection of violations of the motor vehicle law, the apprehension and prosecution of offenders and the disposition of fines collected," these duties being removed from the commissioner of motor vehicles.[3] The Connecticut police were especially active in enforcing the anti-billboard nuisance law.

Likewise, the New York legislature of 1921 increased the powers of the state police and required them to assist the game protectors and the forest rangers in enforcing the conservation laws. Close coöperation in this matter was provided by requiring each member of the state police to keep a daily record of his activities and to report them every week to the superintendent of state police, who in turn must report to the chief game inspector at the close of each month.[4] Since this law was passed the institution has made notable progress in the training and the employment of police dogs in connection with their work.

Both the functions and the jurisdiction of the Idaho state police were enlarged in 1921 by legislation which created a detective bureau and required the chief peace officers of all counties, cities and villages to furnish the chief of the state constabulary with daily reports of arrests, made by them and of lost or pawned property in their offices. These reports must include copies of finger-prints and other descriptive data pertaining to all persons arrested who may be fugitives from justice or who may have in their possession goods that would indicate criminal character, for instance such items as burglar outfits, concealed firearms and equipment for counterfeiting money. Finger-prints of inmates of the state penitentiary must be classified and indexed, also, along with kindred material for the use of national authorities as well as for local officials.

[3] Connecticut, *Public Acts*, (1921), Chap. 273.

[4] Laws of New York (1921), Chap. 328. For a detailed account of the New York State police dogs, see *The State Trooper Magazine*, (Detroit, 1921) Vol. 3, p. 15.

The jurisdiction of the constabulary "shall be coextensive with the territory of the state of Idaho and not limited by the lines of any political or municipal subdivision."[5] A suggestion of the principle that might be readily established in an uniform and simplified interstate extradition custom and in national and state coöperative legislation seems to be implied in this Idaho law by the exacting stipulation that the chief must collect such data pertaining to "all persons who have been or shall hereafter be convicted of felony or imprisoned for violating any of the military, naval or criminal laws of the United States of America, or of any state or territory and of all well known and habitual criminals, from wherever procurable."

During the same year Wyoming replaced its prohibition commissioner with a department of law enforcement, to include not more than nine men besides the sheriffs of the state.[6]

The New Jersey department of state police was created in 1921 and expanded in 1922 to include about eighty men commanded by a superintendent.[7] It is organized on strict military principles to include a headquarters company and two troops of line duty policemen. The troopers are graded somewhat after the plan of the tables of organization of the United States Army, and they include about forty-five privates; noncommissioned officers including the ranks of corporal, medical sergeant, stable sergeant, supply sergeant, first sergeant, sergeant-major; and, commissioned officers including the ranks of lieutenant and captain. Both a physician and a veterinarian are provided, as well as civilian cooks and certain special services. The pay of the enlisted men ranges from $1200 to $1500 a year, while that of the commissioned officers ranges from $2000 to $2400 a year, excepting the superintendent whose salary is $5000 per annum. All of the troopers "shall receive an increase of one hundred dollars per year during continuous service after the completion of the first enlistment of two years, and until the fifth year, when the aggregate increase of three hundred dollars per annum shall have been reached."

All of the officers and troopers are appointed by the superintendent, but only American citizens between the ages of twenty-one and forty years are eligible for such service. All appointees must have passed

[5] Idaho *Session Laws* (1921), chap. 67.

[6] Wyoming, *Session Laws* (1921), chap. 18.

[7] New Jersey *Laws* (1921), chap. 102, and *Ibid* (1922), chaps. 81 and 271. For other details as to activities, see the *State Police Magazine* (New York, 1921) Vol. III, p. 699 ff; and the *Annual Reports*.

"a physical and mental examination based upon the standard provided by the rules and regulations of the United States Army," and the "voluntary withdrawal from the state police force without the consent of the superintendent of state police shall be a misdemeanor." The commissioned officers "shall have served at least two years as an officer in the army of the United States, and shall have been honorably discharged from such service with a rank not lower than that of a lieutenant."

The superintendent of the state police is "appointed by the Governor, by and with the advice and consent of the Senate, for a term of five years." He is "the executive and administrative head" of the force, and in him there is vested much power. He is authorized not only to appoint the entire police force, but also to equip the service with uniforms and other supplies. He is empowered to "establish headquarters and patrol stations in such localities as he shall deem most advisable for the protection of the rural and suburban portions of the State, and for the enforcement of the laws of the State;" to regulate and discipline the force; and, with the approval of the Governor, to "create a State detective bureau, under his immediate supervision, which shall maintain facilities for the detection of crime of the State police, and shall coöperate with and afford central information and finger-prints and other records for the various counties." A petty-cash fund is authorized for disbursement in cases where the immediate payment of moneys is necessary for the execution of the police mission.

The general duties of the New Jersey police as a body include the prevention of crime, protection of forests and game, inspection of motor vehicles, the furnishing of first-aid to the injured, and coöperation with any department of the state in detecting crime. It is specially stipulated, however, that they "shall be employed primarily in the furnishing of adequate police protection to the inhabitants of the rural sections of the State," but they are "not to be used as a posse in any municipality, except when ordered by the Governor to do so, upon the request of the governing body thereof." Thus the sphere of activities in local governments is preserved.

Annual Reports. Several of the state police superintendents present records of their commands in the form of annual reports. Those of Connecticut, New York and New Jersey reveal significant progress during their first years. They indicate an increasing general acceptance of the policy of crime prevention, censorship of moving pictures in rural communities, and fire protection measures suggesting this. The

minutiae of procedure and the amount of technical skill that is necessary to insure the prevention of crime, of fires, and of traffic accidents, is striking. It is even more significant when a survey is made of the field of crime that has survived those preventive measures. For instance, during the first six months of the year 1923, the New York troopers patrolled 814,568 miles and made 5,982 arrests. During the same period in 1924, they patrolled 1,138,824 miles and made 9,587 arrests. In the first period they imposed $67,913.50 in fines, while in this latter period they imposed $128,032.50. Thus their records were nearly doubled in the year. Other points of comparison indicate either an increase in the amount of crime in New York or an increase in the ability of the police to apprehend the offenders. In either case a greater need for preventive tactics is implied.

The report of the New Jersey department of state police for the year 1922–23 presents some features of the system's installation and of its adaptation to the peculiar police problem that arises from that state's geographical position between the extensive metropolitan areas of New York and Philadelphia. The constant flow of traffic between these cities and from them to the seashore, the propensity of tourists to abuse the highways and to be careless in the matter of fires, the preying of metropolitan thieves upon rural communities, and the facilitity with which agents of interstate crime may escape into adjoining states—these are but indications of that problem.

The New Jersey police was organized by Colonel H. N. Schwarzkopf, a graduate of the West Point Military Academy with wide experience as an army officer. As superintendent, he established a rigid process of training for his troops and distributed them on military principles. Police posts were established in twenty-three localities throughout the suburban and rural sections of the state, from Blairstown and Shrewsbury in the north, to Swedesboro and Cape May Court House in the south. From these twenty-three posts, the troopers were required to patrol day and night. Through personal contact and the telephone they responded to 3000 complaints. They made 4000 arrests, recovered $150,000 of stolen property, saved from fire about $60,000 worth of property, and aided 1500 travelers. In other ways they returned to the state and the people of New Jersey $194,585, more than the cost of the system.

Governors' Messages. In their annual messages to legislatures, the governors of several of the larger states have expressed unreservedly their opinions of the principles of state police as an institution, with

particular reference as to whether it should be established or continued. The majority of such expressions endorse those principles, but negative views are incisive. Collectively, they constitute a symposium on the subject.

Regulation of traffic on state roads seems to have been a major purpose for creating state police in Delaware, as it was also in other states adjacent to metropolitan areas. Governor John G. Townsend informed the 1921 legislature that safety-first legislation was absolutely essential and that the police power of the state highway officials should be augmented. His successor, Governor William D. Denny, in 1923 definitely proposed "that a State Police Force be organized in connection with the highway Police." This could be done, he thought, by gradually increasing the power and personnel of the highway police until they "would assist greatly in enforcing all the laws of the State." Although the police problems of this state and those of Montana are widely different, Governor Denny's idea was similar to that of Governor Joseph M. Dixon of Montana who, in 1921, recommended that certain existing state and local law-enforcing officers should be organized under the oversight of the state warden.

In the adjoining state of Idaho, however, where conditions are similar, Governor C. C. Moore recommended that the "State constabulary law should be repealed, and provision made for a fund for the chief executive to use in enforcing the law in emergencies only, without the necessity and heavy expense of calling out the militia or declaring martial law." His recommendation was eventually accepted, and the state police organization, as such, was abolished.

Governor Edward I. Edwards of New Jersey, who had waged his election campaign with the assertion that he would make "New Jersey as wet as the Atlantic Ocean," urged that the 1922 session of the New Jersey legislature repeal the statute which had created the state police and that the force be dismissed, because it was very questionable "whether the benefit obtained by the people, if any, from the creation of the State police is worth the cost." This legislature, however, increased the appropriation for the police organization and provided for its expansion; and in 1924, Governor George S. Silzer, who had been elected by the same party as had his predecessor, recommended a retirement plan for those state policemen who should be permanently injured in service.

Conflicting governor's opinions concerning state police reached a climax in Colorado in 1923, within a five-day period, when Governor

Oliver H. Shoup and his immediate successor, William E. Sweet, presented to the legislature diametrically-opposed sentiments relating to the Colorado Rangers.

In 1917 the Colorado legislature had created a department of safety whose existence was to cease within ninety days after peace between the United States and Germany had been concluded. Governor Shoup revived the state constabulary under the provisions of the Act of 1917, and in 1921 he recommended that it be maintained by appropriations from the general fund or from the national defense bonds, and that the issue of these bonds be extended for two years. Accordingly, the legislature reorganized the department of safety on a distinctly military basis, known as the Colorado Rangers; and on January 5, 1923, Governor Shoup stated in his annual message that "the time in which the Ranger system has been tried out is a comparatively short one, yet it is gratifying to know that it has been sufficient to thoroughly prove the practicability and efficiency of the system. It has proven to be essential to the welfare of the state, and worth many times the cost. "Colorado has had little industrial uneasiness during the past two years, and virtually none when compared with the prevailing conditions in other sections of our country. This favorable condition has been very largely due to the Ranger organization." He further emphasized his position by approving the budget commissioner's recommendation that "the Colorado Rangers be continued as the most effective and economical means yet devised to prevent disorders in the state, and preserve the lives and property of the citizens of the state in times of stress"

Four days later—January 9—his successor, Governor William E. Sweet, vigorously presented to that body arguments to the contrary, thus: "I believe the existence of the rangers for police purposes and their use to supplant civil officers is wrong, because it deprives our people of the right of local self-government. The Ranger law has created an overlapping of duty, a divided assumption of authority, which has resulted in friction, an absence of coöperation, a lack of efficiency and a heavy burden upon our already overburdened taxpayers.

"I favor the repeal of the Ranger law and the consequent saving of taxes necessary to maintain it, placing the responsibility for the enforcement of law and order in the hands of the sheriff, constables, police officers and other county and city officials charged with this duty, and the Governor as the Chief Executive of the state, backed by the National Guard, and, if necessary, by the army of the United States. The

power and authority will thus be distributed as provided in our Constitution."

In answer to such arguments, Governor Arthur M. Hyde of Missouri devoted a large part of his annual message to a review of the crimes that had recently been committed within that state due to the lack of preventive measures. These crimes ranged from violations of the state highway system and of the game laws to violation of the Volstead Act and an epidemic of arson. His plea for a state police to prevent such crimes is probably the most open and aggressive stand ever taken by any governor.

He emphasized the truth that: "Nowhere is there any effective agency for enforcement of law and maintenance of order except the National Guard. The State owes an inescapable duty to the public to preserve peace and order. To fulfill this duty the National Guard is cumbersome and unbearably expensive. It would be infinitely better to prevent disorders than to quell a riot. The Guard can never be called out until conditions have become serious; usually not until after great damage has been done.

"It is the weakness of government generally—of State and county government particularly—which is responsible for most of the lawlessness in this country. Citizens generally do not realize how small are the powers of their state officials. Under the scheme of government in Missouri, the enforcement of the law is vested entirely in the local authorities. These authorities—sheriffs, marshals, constables and prosecuting officials, are generally untrained in their work. They are all elected locally and share the common desire of mankind to offend none of their constituents. Their jurisdiction is confined to the boundaries of their county. The law does not make it their duty to ferret out crime.

"The best machinery for law enforcement by state authority yet devised is a State Police Force. A state constabulary is the remedy, so far as remedy exists in the powers of government, against lawlessness.

"Such a police force can be trained. It is not balked by a county line. It can protect the state highways. It can enforce the fish and game laws and outlaw the moonshiner. It would have no local, personal or political entanglements. It would be of especial value in preventing riots, and disorder. It would have no fear of proceeding against arson. It would be an ever present protection against lynching. It would command and receive respect. In operation, such a force would practically pay its own way, even leaving out of consideration its great

value as peace officers. It should be under non-political control. Its sole reason for existence would then be to enforce the law equally and equably in every county in the State, and without fear or favor, to protect every citizen in the exercise of his right to life, liberty and property."

National and International Coöperation. The development of state police systems, the revelation of unconquered domains of crime, the difficulty of a conquest of these fields because of the barriers raised by state and national lines—all suggest the advisability of further co-operation amongst states and nations in this matter. The New York legislature seemed to imply this in 1922 when it authorized its state police to coöperate with the national department of labor in certain matters pertaining to rural communities. Two years later, Police Commissioner Richard E. Enright, of New York City, proposed to President Coolidge that a national police bureau be established which would constitute a headquarters for the identification and classification of criminals. He further suggested to the President that invitations be sent through diplomatic channels to European police officials to attend the International Conference of Police Heads in New York in 1925. By that time it is expected that the New York Bureau of Municipal Research will have completed a thorough administrative study of the police systems in each of the sixteen states maintaining regular state police forces.

Bills to create a national police bureau and a bureau of criminal identification have been introduced in Congress; and hearings on two such bills[8] were held by the House committee on judiciary on April 17 and 24, 1924. Such a bureau could readily coöperate with state agencies, such as the California bureau of criminal identification, which has been in active service since 1905, and the kindred bureau in Ohio, which is required[9] to coöperate with bureaus in other states and in the United States department of justice, to develop and carry on a complete interstate, national and international system of criminal identification and action.

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[8] H. R. 8409 and 8580, Sixty-eighth Congress, first session.
[9] *Laws of Ohio* (1923), pp. 6–7.

The Item Veto and State Budget Reform. The movement for budget reform has now reached a point where every state, except Missouri,[1] has enacted some kind of budget legislation. An excellent historical approach to this reform lies in a study of the governor's veto power, particularly his authority to veto items of appropriation. Accordingly, the following article outlines the development of the item veto[2] and indicates its present relation to the budgetary provisions of the states.

The item veto was first established in the Confederate Constitution of 1861.[3] This step was taken for two reasons.[4] In the first place, the ordinary veto had proved inadequate when applied to appropriation bills. Since such measures had to be considered as a whole, improper expenditures could not be separated from those which were necessary, nor was it usually feasible to negative an entire appropriation act because of a few objectionable items. Secondly, the item veto was introduced as a part of a plan to adapt English budget principles to American conditions in order to secure greater harmony between the executive and the legislature. The leaders of the South greatly admired the English governmental system but they were not blind imitators, for they did not wish to set up a parliamentary type of government in the Confederate States. Hence, it was provided that proposals for expenditure should originate with the President while Congress, with two unimportant exceptions, was forbidden to initiate appropriations unless they were authorized by a two-thirds vote of both houses. To defend his budget estimates, the President was given the item veto. These provisions were intended to be a compromise between English financial procedure and prevailing American practice. Thus, at the outset,

[1] The Missouri budget act of 1921 was defeated on a referendum vote in 1922; the budget amendment, proposed by the recent constitutional convention, was rejected by the people in February, 1924.

[2] Useful discussions of the item veto are contained in the following: John A. Fairlie, "The Veto Power of the State Governor," *American Political Science Review*, Vol. XI, No. 3 (1917); N. H. Debel, *The Veto Power of the Governor of Illinois* (Urbana, 1917); K. E. Carlson, *The Exercise of the Veto Power in Nebraska* (Lincoln, 1917).

[3] In A. N. Holcombe's *State Government*, it is stated (pp. 112, 113) that New Jersey adopted the item veto in 1844. This is an error due to a misleading caption in F. N. Thorpe's *Federal and State Constitutions*. The item veto in New Jersey dates from 1875.

[4] Robert H. Smith (the man who proposed the item veto in the constitutional convention of the Confederacy), *Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America*, pp. 7–11. (Mobile, 1861.)

the item veto was associated with the idea of an executive budget. The English analogy further appears in that Congress was empowered to grant seats in either house to cabinet members with the privilege of speaking on measures concerning their departments.

Interesting as these new features were, the war and the collapse of the Confederacy prevented them from being tested under normal conditions; in fact, the item negative was never exercised by President Davis. When peace was restored, the item veto was not lost sight of, but was copied by Georgia (1865) and Texas (1866). It has since spread rapidly so that it now exists in all but eleven states,—Maine, New Hampshire, Vermont, Connecticut,[5] Rhode Island, Indiana, Iowa, Wisconsin, Nevada, Tennessee, and North Carolina. As stated before, the Confederate item veto was adopted, not only because the ordinary veto was inadequate, but also because it was intended to function as a part of the executive budget machinery. However, when the new device was introduced in the states, the second reason was largely overlooked and the other parts of the machinery were omitted. Originally, the primary purpose of the item negative in the states was to prevent improper or unconstitutional appropriations rather than to restrain expenditures which were merely excessive in amount.[6] This purpose has, in the main, been successfully accomplished. But in time, owing to the increasing cost of government and the extravagant habits of legislatures, the original intent of the item veto has become subordinated to a demand that the governor extensively use his veto authority as a means of compelling the state to live within its income.[7] Under such circumstances, the item veto began to disclose serious defects, the nature of which will be indicated later.

The growing realization of these defects led to reforms along several lines, the most important of which was the state budget movement. Earlier and quite apart from any budgetary legislation, the scope of the item veto was extended in Pennsylvania. Starting in 1885, the governors of that state, without specific constitutional authority, began to reduce items of appropriation with a view to checking improper itemization by the legislature. Thus, it was no longer possible for that body to prevent the use of the item negative by putting necessary and unnecessary expenditures together in lump-sum items. In 1901, this

[5] An item veto amendment is now pending in Connecticut.

[6] *Debates*, New York Constitutional Convention of 1867–68, II, pp. 1109–1126.

[7] See Debel, *op. cit.*, pp. 120–125, for the experience of Illinois on this point.

practice was upheld by the state supreme court[8] and thenceforth was employed on a large scale. From 1901 to 1924, the average number of items reduced per session was 121 while the average number vetoed *in toto* was only 53.[9] Nor do these figures tell the whole story. Over 40 per cent of the output of the Pennsylvania legislature consists of appropriation acts, most of which are special or local in character. The decision of 1901 applied directly to only one of the 200 items in the general appropriation bill, but the language of the court was broad enough to imply a similar power of reducing special appropriation measures, each authorizing a single expenditure for one particular object. The governors immediately took advantage of the implication. Besides the items referred to above, the average number of single-item appropriation bills scaled down at each session was 115. For example, in 1913, 516 appropriation bills were enacted by the legislature; of these 110 were negatived in their entirety, 147 single-item bills were reduced, 410 items in 139 measures were disapproved or reduced, while the remaining 120 acts were signed by the governor without change. The aggregate amount vetoed was over $21,000,000 or 23 per cent of the total appropriated by the legislature. Furthermore, at each session, most of the appropriation measures were passed just before adjournment, and were sent to the governor for his action in the thirty-day period following the close of the session. Thus, from 1901 to 1924, of the total number of appropriation bills and items which the governors disapproved or reduced, 98 per cent were disapproved or reduced in the thirty-day period. The few bills and items which received executive action before adjournment were mainly emergency and deficiency acts. Since a veto after adjournment is not subject to legislative review, it may be affirmed that, under the conditions prevailing up to the passage of the budget act of 1923, the governor of Pennsylvania had an absolute negative over the expenditures of the state. The legislature appropriated recklessly and went home, leaving the executive to make ends meet by whatever reductions he thought proper.

[8] Commonwealth v. Barnett, 199 Pa. 161. Briefly, the facts of this case were as follows: In the general appropriation bill of 1899, there was one item appropriating $11,000,000 to the public schools of the state. The governor vetoed $1,000,000 of this item and approved the remaining $10,000,000. In sanctioning the reduction, the court was compelled to place a strained interpretation upon the item veto provision in the state constitution. Apparently, the judges feared that a contrary decision would invalidate the entire amount; they were also influenced by the argument from prescription since the practice had been used for fifteen years without being challenged in the courts.

[9] *Governor's Vetoes; Laws*, 1901–1923.

As previously stated, the Pennsylvania plan was evolved prior to any budget reform. Ten or fifteen years ago, it had considerable popularity and many governors and publicists advocated the enlargement of the item veto so as to permit the reduction of items. Moreover, in about a dozen states, besides Pennsylvania, the governors attempted to reduce items or to disapprove parts of items. Their efforts, however, were not very successful because the courts, in the absence of specific constitutional authority, were inclined to hold such action void,[10] and because the item veto, both in its original and modified forms, was rather generally opposed by the new school of budget reformers which was developing about the same time.

It now remains to speak of the state budget movement and of its effect upon the veto power. In lieu of Pennsylvania's modified item negative, the budget advocates presented a counter proposal which found complete expression in the New York budget provision of 1915 (rejected by the voters) and in the Maryland budget amendment of 1916. According to the budget reformers, the veto and the item veto as applied to appropriation bills were illogical and ineffective. They were illogical because they reversed the relation which should exist between the governor and the legislature. Instead of the executive

[10] State v. Holder, 76 Miss. 158 (1898); Regents of the University v. Trapp, 28 Okla. 83 (1911); Fulmore v. Lane, 104 Tex. 499 (1911); State v. Forsyth, 21 Wyo. 359 (1913); Nowell v. Harrington, 122 Md. 487 (1914); Fergus v. Russel, 270 Ill. 304 (1915); Fairfield v. Foster, 213 Pac. 319 (Ariz. 1923); Peebly v. Childers, 217 Pac. 1049 (Okla. 1923); Wood v. Riley, 219 Pac. 966 (Calif. 1923); Strong v. People, 220 Pac. 999 (Colo. 1923); Mills v. Porter, 222 Pac. 428 (Mont. 1924).

The above cases either deny the power to reduce items, or contain *obiter dicta* denying that power, or evade passing upon the question. Thus, they differ from the affirmative decision of Commonwealth v. Barnett. A further difference lies in the fact that the Pennsylvania case involved a very large amount in a single item while the other cases involved minor reductions in relatively small items. In Colorado, items were first reduced in 1913, but the validity of this action was not judicially determined until 1923. In Strong v. People, the Colorado supreme court specifically rejected the prescriptive argument which had been successfully used in Commonwealth v. Barnett.

The fundamental question in many of these cases is "What constitutes an item?" Such an issue arises when the legislature appropriates a single item and then seeks to apportion that item either tentatively or directly into further divisions. This question particularly engaged the attention of the court in Regents of the University v. Trapp, and Peebly v. Childers. See also Martens v. Brady, 264 Ill. 178 (1914); People v. Brady, 277 Ill. 124 (1917); and Mitchell v. Lowden, 288 Ill. 327 (1919).

initiating appropriations subject to the revision of the legislative department, which was supposed to control the purse, the opposite situation prevailed. The veto and the item veto were ineffective because responsibility for expenditures was divided. They encouraged extravagance on the part of the law-making branch so that it came to rely upon the governor to make ends meet. Moreover, it was not enough for the executive merely to negative large sums. What was often needed was a general reduction all along the line, and it was not easy to secure a balanced outlay simply by disapproving a bill or an item here and there. Finally, in many states, the major appropriation acts were generally passed at the end of the session. If executive action on them was required before adjournment, the governor had too little time for careful scrutiny; on the other hand, if he was allowed to negative appropriation measures and items after adjournment, his veto was usually final. It was subject neither to legislative reconsideration nor to adequate public criticism, and it might be used to reward or punish members of the legislature through the approval or disapproval of "pork" projects.

Such criticisms made it increasingly clear that the veto and the item veto, when used alone, were insufficient to cope with the mounting costs of state government. An era of efficiency and economy commissions helped to focus attention on this fact as well as on the need of administrative reorganization. The outcome was a budget reform movement which swept the country and led to the enactment of budgetary legislation in forty-seven states. It is not the purpose of this article to analyze this legislation. The main question now under consideration is, "What has been the effect of the recent movement on the governor's veto power and especially on the item veto?" Obviously, the effect will vary widely in the different states. Nevertheless, the state budget systems may be classified into three groups: those established by legislative act—thirty-one states[11]—which, in form, do not affect the constitutional provisions governing the item veto, but which, in fact, may affect the operation of the item veto; those based on constitutional amendment—Maryland, West Virginia, Nebraska—which specifically curtail the scope of the item veto; and those based on constitutional amendment—Massachusetts, California—which specifically enlarge the scope of the item veto.

[11] By constitutional amendment in Louisiana.

The budget systems of the first group may affect the use of the item negative in two ways. If the law requires the governor to prepare the budget, he has a renewed incentive to use his veto authority as a means of defending his proposals against legislative additions. Under such circumstances, it is easy for him to disapprove special appropriation bills initiated by the legislature and new items added by that body. On the other hand, the executive has no direct power to prevent increases in the items originally submitted. The simplest remedy for this difficulty is to enlarge the item veto so as to allow the reduction of items. This step is not objectionable provided it is made an integral part of an adequate executive budget plan and not, as in Pennsylvania, an isolated and irresponsible instrument of financial control. A second effect of statutory budget systems has been to secure the enactment of the major appropriation measures long enough before adjournment so that any items disapproved therein are subject to legislative reconsideration. Thus, the item veto is made suspensive in fact as well as in theory whereas, too often under the old regime, it was absolute in fact. This speeding-up process is well illustrated by the experience of New York under the budget act of 1916. Before the passage of that act, the item veto was chiefly used after the legislature had adjourned; since then, it has been mainly exercised during the session. From 1899 to 1917, the governors of New York disapproved a total of 121 items before adjournment and 1901 after adjournment; from 1917 to 1924, they negatived 391 items before adjournment and only 7 afterwards.[12] In this connection, it may be noted that, in 1917, 4 items were repassed over the governor's veto, the first time such a thing had ever occurred in that state. A further consequence of the New York budget legislation has been to shorten the time for the executive consideration of items, since the governor has only ten days during the session as opposed to thirty days after adjournment. The result is similar in some of the other states, particularly in those where the legislature must enact the budget bill before any additional appropriation measures are considered.

Turning now to the second group of states, the operation of Maryland's executive budget plan is of chief interest. The Maryland budget amendment of 1916 has the practical effect of taking the item veto from the governor and vesting it in the legislature. Under this amendment, virtually all appropriations are initiated by the governor and presented

[12] *Public Papers of the Governor*, 1899–1923.

to the legislature in his budget bill. For the most part, the legislature can only strike out or reduce items in that bill. Hence, there is little point in applying the executive veto to the budget act which, therefore, becomes law without further action by the governor. After the final enactment of the budget, the legislature is permitted a narrowly restricted power to pass special appropriation measures for particular purposes, but these are still subject to veto. The results of the Maryland budget system are indeed striking.[13] In the 1918 budget bill, the legislature struck out only two small items and approved the rest as submitted. The general assembly then managed to pass eight insignificant special appropriation acts, of which the governor vetoed one and reduced one. In 1920, the budget was adopted without change by the legislature which, thereupon, proceeded to enact six other appropriation bills, all of which were negatived. The governor also disapproved 64 highway bills which sought to impose future obligations on the treasury. The general assembly of 1922, a more critical body than its predecessors of 1918 and 1920, struck out 18 items in the budget bill, reduced 93 others, and increased 64 items for judicial salaries.[14] On the other hand, but one act carrying a specific appropriation ($1500) was passed and this was signed by the governor.

The experience of Maryland during these years shows the effect of a thorough-going executive budget on the veto power. Since the budget bill is the only one likely to contain itemized appropriations, and since the governor may not disapprove it in whole or in part, it follows that the item veto is practically obsolete. However, the veto of special appropriation measures may be used to keep the budget totals from being exceeded and this helps to explain why such measures have been so few in number. Moreover, after the budget is passed, there is little time left for additional legislative appropriations. It is, therefore, apparent, that the veto power in Maryland has become less important as a check upon expenditure. Its chief value now is in preventing the legislature from creating new offices and authorizing new undertakings which, if sanctioned, would necessitate future appropriations.[15]

[13] *Laws; House* and *Senate Journals*, 1918–1922.

[14] The amendment permits the legislature to increase judicial and legislative items.

[15] The West Virginia budget amendment of 1918 is like that of Maryland except that the budget is not prepared by the governor but by the board of public

The enlarged item veto of Pennsylvania and the Maryland executive budget plan are both extreme in the degree to which they permit the governor to control appropriations. Massachusetts and California have sought a more moderate solution of the problem. Under the Massachusetts amendment of 1918, the governor prepares and submits the budget accompanied by a general appropriation bill. Until this bill has been enacted, the legislature is forbidden to pass any special appropriation measures unless recommended by the governor or for purely legislative expenses. On the other hand, the general court has full power to "increase, decrease, add, or omit items in the budget," while the executive is authorized to "disapprove or reduce items or parts of items in any bill appropriating money." The item veto had not existed in Massachusetts before 1918, but, in introducing it as a part of the executive budget machinery, that state unconsciously went back to the original Confederate model, a model which sought to

works consisting of the governor and six other elective officers. This amendment likewise practically abolishes the item veto since the general appropriation bill is usually the only one itemized. The governor has but a limited influence in its preparation and no authority whatever to disapprove it. Of course, he may still negative other appropriation measures and items but, since 1918, none of these have been vetoed. The net result of the change is that the governor has less power than formerly to restrain expenditure.

The Nebraska budget amendment of 1920 is less drastic than those of Maryland and West Virginia. The governor formulates and presents the budget, any item of which the legislature may strike out or reduce, but no increases may be made except by a three-fifths vote of each house and such increases cannot be vetoed. Since a three-fifths vote is also required to override a veto, it was argued that this provision would not weaken the governor's negative. This, however, is scarcely true, for it is usually more difficult to obtain a three-fifths majority after the executive has clearly raised the issue through the disapproval of a bill or item. At any rate, this was the case in 1921 during the first year of the budget's operation. The legislature freely reduced or omitted items in the governor's estimates but these changes were more than offset by the increases which it made. The three-fifths vote prescribed for such increases was obtained without much trouble. The net result of the legislature's action was to raise the budget figures from $21,368,000 to $22,591,000. Not being able to veto the increase and strict economy being necessary, the governor called a special session in 1922 for the purpose of reducing the appropriations of the previous year. By repealing and reënacting the chief appropriation bill of 1921, a reduction of over $2,000,000 was secured. (*Laws; House* and *Senate Journals*, 1921–22.) The weakness of the Nebraska plan is evident; the executive is denied the item veto as a means of defending his budget against legislative increases.

give the executive adequate control over expenditure without too greatly curtailing the power and usefulness of the legislature.

The results of the Massachusetts budget system may now be summarized.[16] From 1919 to 1923 inclusive, no items or parts of items were negatived or reduced by the governor. On the contrary, it was the general court which exercised a veto power over the executive budget estimates. Thus, the legislature struck out 19 items in the 1920 budget, 24 items in the 1921 budget, and 18 items in the 1922 budget. Some items were reduced, others were increased, and a few new items were added against the wishes of the governor who, nevertheless, refrained from disapproving these additions. In every year, the total amount appropriated was less than the total proposed by the executive. In each year, appropriations in addition to those contained in the original budget were made, but these were usually based either upon the supplementary budgets submitted by the governor or upon recommendations in his messages. These supplementary appropriations were enacted in relatively few bills, never exceeding seven per session. No special or private appropriation acts were vetoed by the governor. However, this does not mean that the general court entirely neglected pet schemes. Some of these were incorporated in the general appropriation act or in the supplementary bills, but the governor did not attempt to disapprove them. Others were passed without carrying specific appropriations. At each session, there were a few measures enacted which sought to impose future financial obligations on the state; ten of these were negatived as a means of sustaining the budget proposals. On the whole, the Massachusetts budget system has been a success. The governor has done careful work in revising and reducing the original departmental estimates sent to him. On receiving the budget, the general court has carried the reduction process still further so that there was little occasion to use the veto power on the appropriation bills as they were passed by the two houses. Although the estimates submitted are only tentative and might be altered beyond recognition by the legislature, this has not happened, for that body through its committees has handled the budget in an efficient manner. Were this not the case, the governor probably would have made a more extensive use of his veto power than was done. The mere fact that no items were disapproved or reduced and that no bills carrying specific appropriation were negatived does not prove that the veto prerogative

[16] *Laws; House* and *Senate Journals; Legislative Documents*, 1919–1923.

has no place in the budget machinery. Perhaps in the future, there will be a pronounced conflict between the legislature and the executive on the subject of finance.[17] If so, the veto and the item veto will enable the governor to force the general court to reconsider and to assume full responsibility for any budget changes which it has made.

In view of the results obtained under the several types of budget systems heretofore discussed, what shall be said in conclusion concerning the future of the item veto? It seems clear that both the veto and the item veto should be essential parts of a properly adjusted budget plan such as that existing in Massachusetts. Although the item negative in the states has outgrown its original purpose, it should not be abolished but should be retained and enlarged so as to allow the reduction of items. This, together with the ordinary veto, will afford the governor sufficient means for the protection of his estimates and, at the same time, will make unnecessary such a drastic curtailment of the legislature's power over finance as is found in Maryland. It is desirable that future budget developments in the states should be according to the principles first tried out in the Confederate States and more recently elaborated by the experience of Massachusetts and California.

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[17] Such a conflict did, in fact, develop in California, the only state which has copied (1922) the Massachusetts budget plan. The California session of 1923 was marked by friction between the governor and the legislature. The executive budget estimates called for a total appropriation of $79,754,000. The legislature did not reduce this amount but rather tried to increase it, particularly the items for educational, charitable, and penal institutions. The increases thus made totaled $1,170,000. By reducing 21 items and vetoing 28 others, the governor entirely eliminated this increase and, after a hard fight in the lower house, his action was sustained. In addition to the budget bill, 67 other appropriation bills were passed by the legislature, of which 22 were negatived by the executive. (*Laws: Assembly Journal*, 1923.)

NEWS AND NOTES

Personal and Miscellaneous

EDITED BY FREDERIC A. OGG

University of Wisconsin

The next annual meeting of the American Political Science Association will be held at Washington December 29–31. The headquarters of the Association will be at the New Willard Hotel. A special feature of the program is to be a series of round-tables, each meeting on the three successive forenoons during the session. Speaking broadly, the round-table meetings will be devoted to the formulation of research problems, consideration of methods of promoting and carrying on research, and summaries of progress made in recent times in the several fields. A round-table on the relations of politics and psychology will be led by Professor L. L. Thurstone of the University of Chicago; one on public administration by Dr. W. F. Willoughby of the Institute of Government Research; one on international affairs by Professor E. D. Dickinson of the University of Michigan Law School; one on comparative government by Professor W. J. Shepard of Washington University; one on political parties by Professor Raymond L. Moley of Barnard College; and one on political statistics by Professor A. N. Holcombe of Harvard University. Members of the Association who expect to attend the December meeting are urged to communicate with the chairmen of these round-tables in order that each may know approximately how large a group may be expected. Membership in the round-tables is open to all members of the Association, and no restrictions are to be imposed upon participation in more than one round-table. It is supposed, however, that each round-table will consist primarily of persons whose special interests lie in the field which it covers.

In addition to the round-tables there will be sessions of the usual sort. One will be devoted to public personnel administration and another to phases of public law. A subscription luncheon will afford opportunity for an address by Professor G. G. Wilson, of Harvard University, on the modernization of international law; another will be devoted to

reports from the committee on political research; and a third will have as its chief feature an address by Professor A. N. Holcombe, of Harvard University, on the elections of 1920. The annual presidential address will be delivered by Professor James W. Garner, of the University of Illinois, and at the same session there will be an address by Sir Esme Howard, ambassador of Great Britain to the United States. What promises to be a very interesting session is one to be held jointly with the American psychological Association on the general subject of the psychological basis of conservatism and radicalism. The meeting will close on the afternoon of December 31 with a joint session with Section K of the American Association for the Advancement of Science, at which papers will be presented on phases of commerce and population.

A meeting of the executive council and board of editors of the American Political Science Association was held at Chicago on September 9, in connection with the National Conference on the Science of Politics. Preliminary reports of officers and committees were heard, and plans for the annual meeting at Washington in December were discussed. A committee to nominate officers for 1925 was appointed, with Professor C. D. Allin, of the University of Minnesota, as chairman.

Professor W. W. Willoughby, of Johns Hopkins University, will attend the International Opium Conference at Geneva in November as technical adviser to the Chinese minister, Dr. Alfred S. K. Sze. During his absence from the university, Dr. Johannes Mattern will give a course of lectures dealing with governments and constitutional law of the German Republic and other states of Central Europe.

Professor R. G. Gettell, of the University of California, has been appointed dean of the college of letters and science in that institution. He will continue to serve as a professor of political science.

Professor Edwin A. Cottrell, of Stanford University, has been elected mayor of Palo Alto.

Dr. Milton Conover, formerly of New York University, and also of the Institute for Government Research at Washington, has accepted an instructorship in political science at Yale University. He will give courses on national administration and state and local government.

Professor William Anderson, of the University of Minnesota, is on leave of absence during the present academic year. Mr. A. V. Johnson, of Gettysburg College, has charge of his courses in municipal government.

Mr. C. Walter Young has been appointed an instructor in the department of political science at the University of Minnesota.

Professor C. F. Littell, formerly of Allegheny College, has been appointed professor of political science at Cornell College, Iowa.

Dr. O. D. Skelton, of the department of external affairs at Ottawa, served as secretary of the Canadian delegation at the September meeting of the Assembly of the League of Nations.

Dr. William H. George has resigned his position at the University of California, Southern Branch, to become associate professor and chairman of the department of political science at the University of Washington.

Mr. Frank J. Laube has been made an assistant professor of political science at the University of Washington. He spent the summer quarter in graduate study at the University of Chicago.

Mr. K. C. Cole has been appointed instructor in government at the University of Washington. Mr. Cole has received the B. Litt. degree at Oxford, and has passed the eligibility examinations for the degree of Ph.D. at the same institution.

Mr. Edward B. Logan, formerly a graduate student at the University of Chicago, has been appointed an instructor in political science at the University of Pennsylvania. His work will be chiefly in the course in American Government.

A Penfield scholarship at the University of Pennsylvania has been awarded to Dr. W. Leon Godshall, assistant professor of political science at Union College. Dr. Godshall has gone to the Far East to make a further study of the international aspects of the Shantung problem—the subject of his doctor's thesis. The Penfield scholarships are awarded annually and provide a sum of $2000 to be employed in intensive research either in this country or abroad.

Mr. O. P. Field, formerly a graduate student at the University of Minnesota, has been appointed instructor in political science at the University of Indiana.

Professor A. C. Hanford, of Harvard University, has been made director of the university's summer session. He served in this capacity during the past summer.

Mr. Daniel B. Carroll, formerly a graduate student at the University of Wisconsin, has been appointed to an instructorship in political science at the University of Vermont.

Dr. Miller McClintock, of the bureau of municipal research of Harvard University, has been appointed assistant professor of political science at the University of California, Southern Branch. During the past summer Dr. McClintock was retained by the Los Angeles Traffic Commission as traffic expert, and in that capacity he revised the city's traffic laws and regulations.

Dr. Malbone W. Graham has resigned his position as adjunct professor of government at the University of Texas to become assistant professor of political science at the University of California, Southern Branch.

Mr. Ordean Rockey, former Rhodes scholar from the state of Pennsylvania, has resigned as instructor at Dartmouth College to accept a position at the University of California, Southern Branch.

Dr. James B. Lockey, of the University of California, Southern Branch, gave courses in international law and diplomacy at Peabody Teachers College during the past summer.

A volume on *The Foreign Service of the United States*, by Consul-General Tracy Lay, will be published by Prentice-Hall in January, 1925.

By invitation of President Coolidge, extended through Mr. Hugh S. Gibson, American Minister at Berne, the Interparliamentary Union will hold its next annual meeting in Washington, during the summer of 1925.

An Academy of Comparative Legislation has been organized at Geneva under the protection of the League of Nations for the purpose of studying problems of international law, especially those connected with codification. The membership is restricted to thirty representative jurists of various countries. André Weiss of France has been elected president.

The session of the Institute of International Law held at Vienna in August was attended by forty-four members and associates, representing seventeen countries. Three members from the United States were Philip Marshall Brown of Princeton, Frederic R. Coudert of New York, and James Brown Scott, secretary of the Carnegie Endowment Fund, of Washington. Next year's session will be held at the Hague and will be featured by a celebration of the three-hundredth anniversary of the publication of Grotius' *De Jure Belli ac Pacis*.

The University of Chicago has instituted a new series to be known as the University of Chicago Studies in Social Science. The publication of these studies is one of the results of a comprehensive program of research which has been undertaken by the social science departments, not only as separate departments, but also as a group or conference of departments. The editorial committee consists of Professors L. C. Marshall, Chairman, A. W. Small, C. E. Merriam, M. W. Jernegan, T. V. Smith, W. H. Spencer, and Edith Abbott. The first publication in the series was a volume by Professor Merriam and Dr. Harold F. Gosnell entitled "Non-voting, Causes and Methods of Control."

The annual meeting of the Institute of Politics at Williamstown in July and August was the first session of a new five-year program announced by the administration of the Institute. The endowment of the Institute to support the forthcoming sessions has been jointly subscribed by the General Education Board and Mr. Bernard M. Baruch. Membership in future sessions will be open, as heretofore, to college and university teachers of politics, history, and economics.

The program of the meeting this year followed in general that of previous sessions, consisting of a series of closed and open round-table conferences and lecture courses by scholars and publicists from foreign countries. A comprehensive and admirably balanced list of topics on international affairs was presented for investigation and discussion. Economic and financial questions constituted the subject-matter for

three round-tables, namely: The Financial Rehabilitation of Europe, led by Professor Allyn A. Young of Harvard University; International Finance in the Commercial Policies of Nations, led by Dr. William S. Culbertson of Washington, D. C.; and Reconstruction of Europe and the League's Contribution, conducted by Sir Arthur Salter of Geneva. Political questions, European and American, were discussed in the following conferences: Political Factors in Europe Today, led by Professor Sidney B. Fay of Smith College; Inter-American Relations: the Elements of a Constructive Pan American Policy, led by Dr. L. S. Rowe of Washington, D. C.; and Russia and Its Problems, led by Dr. Boris B. Bakmeteff of New York City. Mr. John Van Antwerp MacMurray of the department of state conducted a round-table on Problems of Foreign Relationships with China; Sir Paul Vinogradoff of Oxford University, England, was leader of a conference on Problems of Political Theory; Population and Related Problems was the title of a round-table conducted by Professor Henry Pratt Fairchild of New York University; a conference on The Conflict of Laws and International Trade was led by Mr. Arthur K. Kuhn of New York City; and Dr. James T. Shotwell and Mr David Hunter Miller conducted jointly a conference on Disarmament and Security.

The round-table conferences were supplemented by the following courses of lectures. The Reconstruction of Europe; its Economic and Political Conditions—their Relative Importance, Mr. Louis Aubert, Paris; The Crisis of European Democracy, Dr. Moritz J. Bonn, Berlin; History and Policy of the British Labor Movement, Professor Richard Henry Tawney, London; Present Day Japan: Its Social and Political Problems and Tendencies, Yusuke Tsurumi, Toyko; The Reawakening of the Orient, Sir Valentine Chirol, London; The Economic Recovery of Europe; Economic Conflicts as Causes of War, Sir James Arthur Salter, Geneva.

The first annual session of the Furman Institute of Politics was held at Greenville, S. C. from August 5 to 15. The new Institute was established under the auspices of Furman University and was conducted along the same general lines as those followed by the Institute of Politics at Williamstown, the object being to promote the study of national and international problems by those whose position makes them leaders of public opinion. The program of the Institute consisted of morning and evening public lectures and of round-table conferences

limited to registered members. The lectures were regularly followed by open forum discussions, which greatly added to the interest of the subject. Questions of national government were handled by Professors Corwin and Myers of Princeton; questions of foreign governments by Professor Rogers of Columbia; questions of foreign policy and diplomatic history by Professors Garner of Illinois, Hudson of Vanderbilt, Logan of Rutgers, and Thach of Johns Hopkins; and questions of international law by Professors Wilson of Harvard and Fenwick of Bryn Mawr. A special course on taxation in South Carolina was conducted by Professor McPherson of the University of Georgia. Mr. Hamilton Holt delivered several lectures on the origin and functions of the League of Nations, and Hon. Josephus Daniels and Hon. J. J. McSwain spoke upon naval policy and upon "Peace by Proper Preparedness." At the conclusion of the Institute it was voted by the trustees of Furman University to continue it the following year.

The second annual meeting of the National Conference on the Science of Politics was held at the University of Chicago September 8–12, with an attendance close to one hundred persons. The general method followed was similar to that pursued last year at the Madison Conference, namely, that of holding round-tables with two sessions a day, and a general evening session at which reports were made to the entire Conference. The round-tables were as follows: (1) Politics and Psychology, Chairman, Professor L. L. Thurstone, formerly of the Bureau of Public Personnel Research, Washington, D. C., now of the University of Chicago; (2) The Personnel Problem; Scoring the Civil Service Commission, Professor M. B. Lambie, University of Minnesota; (3) Public Finance; State Supervision of Local Finance, Professor John A. Fairlie, University of Illinois, (4) Legislation, Professor Arnold B. Hall, University of Wisconsin; (5) Political Statistics: The Measurement of Public Opinion, Professor A. N. Holcombe, Harvard University; (6) Nominating Methods; The Development of a Technique for Testing the Usefulness of a Nominating Method, Professor Victor West, Stanford University; (7) International Organization; International Judicial Organization and Practice, Professor Pitman B. Potter, University of Wisconsin; (8) Municipal Administration; Development of a Method for Rating the Relative Efficiency of Cities, Professor E. A. Cottrell, Stanford University.

The membership of the Conference included representatives from all sections of the country and from academic and practical circles. One of

the notable features was the attendance of a considerable group of psychologists, including, in addition to Professor Thurstone, Dr. Yoakum, Dr. Judd, Dr. Mayo, Dr. Schoen, Dr. Kornhauser, and Dr. Allport. The sessions of the several round tables were of unusual interest and indicated substantial progress in the direction of the Conference objectives. Reports of the sessions will be published in the next number of the REVIEW.

It was decided to continue the Conference in 1925, and the following members of the Executive Committee were reëlected: Chairman, Professor A. B. Hall, University of Wisconsin; Professor A. N. Holcombe, Harvard University; Professor C. E. Merriam, University of Chicago; Dr. L. D. Upson, Director of the Detroit Bureau of Governmental Research; and Dr. Luther Gulick, Director of the National Institute of Public Administration.

A new school of citizenship and public affairs has been established in the liberal arts college of Syracuse University, with Senator Frederick M. Davenport of the New York State legislature as advisory counsel; Dr. William E. Mosher, from the National Institute of Public Administration, as managing director; and Professor Russell M. Story, formerly of the University of Illinois, as head of the department of political science. Professor Floyd H. Allport, from the University of North Carolina, will give courses in the psychology of social problems and the psychology of politics. Other members of the staff include: professors F. G. Crawford, Ralph E. Hemstead, William Casey and Waldo Schumacher. A general introductory course on Government and Responsible Citizenship will be required of all freshmen in the liberal arts college. This will be followed in the sophomore year by a more intensive course in American government; and later by more specialized courses in European governments, constitutional and international law, public administration, municipal government, political parties, political philosophy, and social and political psychology. Provision will be made for post-graduate work; and plans are under consideration for the further development of graduate research in coöperation with research institutes.

After twelve years of effort, the Senate committee on judiciary has favorably reported a bill (S. 2061) vesting in the Supreme Court the power to make rules for the regulation of the trial courts. This will be called up for passage early in the coming session of Congress; and will

then go to the House where there is assurance of a prompt hearing and good prospects of its passage by a majority, though opposition will probably aim to delay or prevent definite action. The American Bar Association committee on uniform judicial procedure has urged active efforts to secure prompt consideration and action on this measure.

BOOK REVIEWS

EDITED BY A. C. HANFORD

Harvard University

History of Political Thought. By R. G. GETTELL. (New York: The Century Co. 1924. Pp. xi, 511.)

American political scientists have had no satisfactory textbook on the history of political thought. Books we have had, many excellent ones indeed, on particular phases of the subject, but these could not meet the needs of the teacher who wished to introduce his pupils to the study of political thought by a general survey of its history. Dunning provided an illuminating commentary on the writings of the most eminent political thinkers, but that is not a history of political thought. Pollock and others have furnished suggestive interpretations of the salient political ideas of ancient and modern times, but their contributions do not constitute a history of political thought. It may well be suspected that no adequate history of political thought will ever be written in any one volume, for such a history would require meticulous research into the daily lives of peoples as well as the writings of scholars and the policies of ecclesiastics, statesmen, and princes.

Professor Gettell has not attempted to do this. His book deals mainly with the literature which has been made by the successive generations of writers on politics. But he explains and interprets that literature in the light of the conditions under which it was written. It would not be possible in one volume to present both a guide to all the noteworthy literature and an account of the various environments which give the literature its significance. Professor Gettell has chosen, wisely as it seems to the reviewer, to expand his treatment of the literature at the cost of some neglect of important aspects of the environment. Since he must leave not a little to the teacher, he has left that which most needs the services of the teacher. The result is a text which will be gratefully received by the teachers of political theory in American colleges and universitites.

In a work of this kind there is much room for differences of judgment on problems of organization and the classification of material. Should

Polybius be included among the Greeks because he was a Greek with a Greek's interest and mode of thinking, or with the Romans because his political thinking was prompted by his observations of Roman politics? Should Hobbes be classified with the writers of the social compact school, because he chose the fiction of a social compact for the more convenient exposition of his ideas, or with the analytical jurists whose thinking seems so directly derived from his own? Should Wyclif and Machiavelli be treated in the same chapter because they both came at the close of the middle ages or in very different chapters because their minds ran so far apart? No two teachers would answer all these questions alike. Professor Gettell's order of treatment is convenient as well as conventional. His distribution of space between various periods and schools is equitable. If his treatment of interesting topics often seems too brief (for instance one's appetite for knowledge is scarcely satisfied by a page on the political thought of the Chinese) it is only fair to say that the object of such a book is not to satisfy, but to stimulate, the appetite of the reader. The bibliographical apparatus is excellent. In short, this is a comprehensive and well-balanced text, clearly written and carefully printed.

A. N. Holcombe.

Harvard University.

The Common Weal. By the Right Hon. Herbert Fisher. (New York: Oxford University Press. 1924. Pp. 287.)

In much of the political discussion of today the state—the contemporary, democratic state—is charged with assuming a comprehensiveness of function and a supremacy in authority to which it is not rationally or morally entitled. This challenge comes, on the one hand, from protagonists of nonpolitical associations in the community; on the other hand, from those who are solicitous for the rights of highly endowed and successful individuals. The state, it is said, assumes tasks of collectivist regulation which can be better devised and administered by other associations, smaller, more compact and coherent than the state; or the state seeks to establish equality in opportunity and to supply uniformity in nurture where inequality and diversity would better promote the development of the highest type of individual and the progressive improvement of the human stock. There are practical values in such criticisms, in so far as they indicate the opportunities for improving political structure and policy in the way, for example, of a reorganization of our system of representation, political utilization of

the autonomous action of voluntary, functional associations, and diversification in our methods of education. But much of the criticism seems to be vitiated by exaggeration, proceeding, in the one case, from a limited historical and sociological view, and, in the other case, from a misinterpretation of recent discoveries in the fields of biology and psychology. We need, therefore, to be intelligently reminded sometimes of the extent of the debt owed to society as a whole by both the "spontaneous" association and the "superior" individual, and to hear arguments countervailing the extreme claims of pluralists and individualists. This need is served by the book in hand.

The book gives generous recognition to the political and civic value, on the one hand, of local and group attachments, and, on the other hand, of respect for varied and self-developing individuality. Greater emphasis, as its title indicates, is given to a demonstration of the multifarious debts and credits by which all groups and individuals are bound together, and of the individual and group benefits that result from action directed to the advancement of the neighborhood and national community. Beyond this also, consideration is given to the need for a recognition of national responsibilities to the world, and for a mitigation of recent political education tending toward an intensification of narrow nationalism.

With the general point of view indicated, the author discusses current issues in regard to policies of education of local government; of the limits of political obedience, in respect particularly to military service and expression of opinion; of the claims of wealth, of talent, and of labor; of nationalism and internationalism. The whole discussion is characterized generally by moderation and balance in judgment and sentiment. In a few instances, as in the discussion of the ethics of the distribution of wealth, the attitude seems to tend rather toward quietism than moderatism. In general, the author holds faithfully to the philosophy of the Oxford Idealists—of the Thomas Hill Green, rather than the Bradley-Bosanquet, wing. There is no new theory or new formulization of older theory. But the application is made to such significant problems of current policy, and in a style so vivid and precise, that the book is an informing, illuminating, stimulating study in contemporary politics.

F. W. Coker.

Ohio State University.

Christianity and the State. By S. Parkes Cadman, LL.D., D.D. (New York: The Macmillan Company. 1924. Pp. xi, 370.)

With the development of democracy and its extension among the nations of Western civilization, the value of the moral sanctions upon the growth of liberty has forced itself upon the attention of students of government. Viscount Bryce concludes his study of *Modern Democracies* by the statement that "Governments that have ruled by Force and Fear have been able to live without moral sanctions, or to make their subjects believe that those sanctions consecrated them, but no free government has ever yet so lived and thriven, for it is by a reverence for the Powers Unseen and Eternal which impose those sanctions, that the powers of evil have been, however imperfectly, kept at bay and the fabric of society held together. The future of democracy is therefore a part of two larger branches of enquiry, the future of religion and the prospects of human progress." As a solution of these questions, the volume on *Christianity and the State,* by S. Parkes Cadman, is a notable contribution. His work is an historical and philosophical review of the relations of Christianity to the state during the last two thousand years. It is, in the main, a series of lectures, but much has been added to the lectures before they appeared in book form. His main contention is that the voice of the church and the voice of the state must blend in the kingdom of the new humanity. "The State can seldom if ever, do anything better than support the Christian ethic. Political systems, whether autocratic, oligarchical or democratic, will be judged in history by their adherence to the Eternal Order which authorizes that ethic—The perpetuity of that Order is the secret of the rise and fall of empires and republics."

The first half of his work deals with the growth and purpose of the state, the modern state, and the citizen and the state, and is well worth reading as the development of the state is traced through its long history with the modifications through which it passed from the first Greek city-states, the dominance of the Roman imperialism, the world-state of medievalism and the causes of its failure, to the origin and beginnings of the democratic ideal and its final triumph in the democratic states of the modern world. In his treatment of the history of the church in relation to the state, Dr. Cadman reveals the rare quality in a Protestant theologian of showing the debt that Protestantism owes to the conserving forces of the Catholic Church, and the beauty of the Christian life which came to its flowering in the thirteenth century. This point of view has its bearings upon his conclusions in the last chapter upon the "Challenge of Protestantism."

No short review can do justice to a work of this kind, but it may be enough to call attention to the need of recognizing the moral sanctions and the Christian ethic as factors in the solution of the problems which confront modern governments. This book will well repay study by politicians who desire to know how the ideals of Christianity have entered into the development of the modern state and upon whose acceptance the permanence of the modern state depends.

JOHN SIMPSON PENMAN.

Cambridge, Massachusetts.

The Life of Sir Henry Campbell Bannerman. By J. A. SPENDER. (Boston: Houghton Mifflin Company. 1924. Two volumes. Pp. iii, 351; 411.)

The late British premier has been most fortunate in his biographer. Mr. Spender was exceptionally well equipped for the task by reason of his close personal relations and intimate political associations with the late Liberal leader. Furthermore, he has brought to his study a more scientific point of view than is usually reflected in the glowing biographies of deceased statesmen. "The duty of a biographer," as he well says, "is not to force his own views on the reader but to provide the material on which the reader may form his own opinion." That duty he has ably and sympathetically performed.

The author has presented us with a splendid picture of a genial, canny Scot who combined in an unusual degree the qualities of a moral leader with the gifts of a practical statesman. "In politics he was, in the words of Mr. Asquith, an idealist in aim and an optimist by temperament. Great causes appealed to him. He was not ashamed even on the verge of old age to 'see visions and to dream dreams.' He had no misgivings as to the future of democracy. He had a single-minded and an unquenchable faith in the unceasing progress and the growing unity of mankind. None the less in the selection of means in the daily work of tilling the political field, in the choice of this man or that for some particular task, he showed not only the practical shrewdness which came from his Scottish ancestors, but the outlook, the detachment, the insight of a cultivated citizen of the world." He was, in short, the finest product of Gladstonian liberalism.

The early years of the premier's political life were rather dull and uninteresting. Only slowly did he come to maturity. As a private member of the House, and even as a cabinet minister, he showed little promise of superior parliamentary gifts or statesmanship. He was

happy in his political associations and content with the faithful performance of his parliamentary and administrative duties. His subsequent selection as leader of the opposition in the House of Commons was manifestly a make-shift appointment which threatened for a time to prove disastrous to the fortunes of the party. Few political leaders, in truth, have been exposed to such scorn and indignities, not only from his opponents, but even from within the ranks of his own party. But he bore these attacks with remarkable courage and equanimity and even in the darkest moments did not lose faith in the ultimate triumph of the principles of liberalism and democracy. His faith was supported "not only by his stubborn, indomitable character and his loyalty to principles but by a belief in the qualities of his countrymen, Scottish and English, so intense and abiding as to enable him to possess his soul against the day when the dust and hubbub subsided and the decent plain folk of England were themselves again." In this case, at least, his political faith was not misplaced. Friend and foe alike learned to respect his high integrity; and when at last he emerged triumphant out of great tribulations he had won a place in the confidence and affection of his countrymen such as has been vouchsafed to few public leaders.

It is not surprising, therefore, that the author has been tempted to devote perhaps too much attention to the *Sturm und Drang* period of his political life. The factional struggles of the Liberal leaders undoubtedly played a large part in the political thought of the country at that time, but today these dissensions seem relatively unimportant save as they forecast the future disruption of the Liberal party now so much in evidence.

But for this undue emphasis upon purely internal or domestic affairs "C. B." himself was largely responsible. Like many of his fellow Liberals of that day he was at heart essentially a Little Englander in his political philosophy and outlook, and was only interested in foreign and imperial events insofar as they reacted on English politics or appealed to his democratic and humanitarian sympathies. He was, for example, almost blind to the imperial aspects of Mr. Chamberlain's program, and to the even more striking political significance of the participation of the dominions in the South African War. In short, he thought of the Empire in terms of Mid-Victorian liberalism. He had scarcely begun to think imperially.

He was apparently almost equally oblivious to the approaching war menace on the Continent. His outlook on foreign affairs was colored

throughout by a generous philosophy of international good-will which led him to hope and believe that matters would turn out all right in the end. He was a staunch supporter of the *entente cordiale* and of the *rapprochement* of Russia. The adjustment of the long standing difficulties with France and Russia would, he hoped, serve as a precedent for a similar understanding with Germany. He at least was no party to the policy of German encirclement, howsoever blameworthy he may have been for his unhappy part in the military pour parlers with France. In short, the beneficent ideals of "C. B.," as the author points out, afford the best defense of the peaceful intentions of the British government prior to the war.

This work, we may then assert, more than sustains the author's literary reputation. It is in most respects an admirable example of what a biography ought to be. Throughout the two volumes the author is careful to keep his own views and judgments well in the background and to present the personality and policy of his subject in proper relations to the events and philosophy of his own day. He has shown rare discrimination in the selection of his original material and in fitting it into his interpretation of the life and character of the deceased statesman.

In conclusion we cannot refrain from quoting the author's just tribute to his memory:

"No man was ever more of a democrat and less of a demagogue than Campbell-Bannerman, and if there is anything that may be learnt from his example, it is that a man may still in this country save his life by losing it, and win popular applause and affection by bravely resisting the tumults and excitements of the hour. Of all the arts of manipulating opinion, currying favour with newspapers, trimming sails to the popular breeze, he was wholly innocent. Right or wrong he never had his ears to the ground, or could he turn from a course in which his convictions were engaged by the fear of the polling-booth."

C. D. ALLIN.

University of Minnesota.

The American Colonies in the Eighteenth Century. By HERBERT L. OSGOOD, PH.D., LL.D. (New York: Columbia University Press. 1924. Two volumes. Pp. xxxii, 552; xxiv, 554.)

These two handsome volumes include the first half of the manuscript of the late Professor Osgood's history of the American colonies from 1690 to 1763. Those who are acquainted with his three earlier

volumes on the seventeenth century will know what to expect in these. The point of view throughout is the same, as is the general method of treatment, as well as the style, clear, straightforward and entirely without adornment. The point of view the author himself aptly characterizes as "the politico-economic, with the emphasis on the first part of the compound," and, as he truly says, he continues to the end to "adhere consistently to his chosen path throughout." "Criticism," he pleads "should be directed to the measure of success attained under this limitation. . . . The history of any nation, at any stage of its development, is a subject of great complexity, far too great to be thrown upon the canvas of a single historical work." That this is a real "limitation," Professor Osgood would have been the first to admit, and those must look elsewhere who seek, as they should, for exhaustive treatment of the social and intellectual, or even the economic and constitutional development of early America. But no one who has ever attempted to write history himself will be disposed to condemn a limitation without which no adequate history could be written at all.

The eighteenth century in America presents for the historian some problems which are more difficult than those of the seventeenth. Instead of separate colonies, to a great extent isolated from each other and easily lending themselves to separate treatment, the continental colonies in the eighteenth century are beginning to present common tendencies and a character that may be called "American," though these are developments from separate beginnings and continue throughout to bear the marks of their diverse origins. On the side of imperial control likewise, the period following the English Revolution is marked by a growing tendency toward uniformity, which for much the same reasons could never reach its full realization. The problem here is to avoid the mistake on the one hand of joining together a mere "bundle of colonial histories," and on the other, of ignoring the real diversities which so complicated national development and imperial control alike. Professor Osgood was fully alive to these difficulties, and consciously strove "so to present the history of the colonies, on its political and institutional side, as to show that there was in their development both unity and diversity, and also to show to a limited extent in what these respectively consisted."

But before this could be done or even begun, decision had to be made on the more fundamental question whether the whole of this evolution in America should be considered primarily as "a branch of British

history, in a literal sense an expansion of England;" or rather as part of a development essentially American. Without hesitation Professor Osgood chose the latter point of view. His theme is American development rather than British, and rightly so; but in its treatment he avoids the onesidedness of some of the older books. He never allows himself to forget that this nation whose beginnings he is tracing was at the same time part of the British Empire. "The resultant will not be British history, nor simply the expansion of England. Nor will it be simply American history in a narrow and exclusive sense of the term. But it will be more American that British and that in increasing measure with every decade that passed."

The problem of giving due recognition to the growing unity in the colonies as well as to their diversity has made necessary a somewhat more extended treatment of common conditions, administrative organs, and methods in these volumes on the eighteenth century than in the earlier part of Professor Osgood's work. His method of meeting the problem is a combination of the chronological and the topical. The intercolonial wars are made the basis of division into periods and the several colonies are treated in each of these, with the addition of general chapters on such topics as the administrative framework of the empire, colonial administration in general, commercial relations, the effects of the Trade Act of 1696, colonial union, Indian relations, naval stores, piracy, and the colonial Church. To the student of institutions, these general chapters are particularly interesting, giving as they frequently do, the most authoritative and comprehensive brief accounts yet written upon some of these important subjects.

It is too late in the day to try to give a general estimate of the place of Professor Osgood's writings in the literature of American history. That place has long been recognized as a very high one, and these new volumes are not likely to change that estimate to any appreciable extent. They are a worthy continuation of his standard work on the seventeenth century into a period where the problems are vastly more difficult, the sources more extensive but much less easy of access, and the modern books fewer and not nearly so satisfactory.

C. H. McIlwain.

Harvard University.

International Law and Some Current Illusions and Other Essays. By John Bassett Moore. (New York: The Macmillan Company. 1924. Pp. xviii, 381).

In this volume Judge Moore has collected articles and addresses produced during the past ten years with the purpose of "contributing

something towards the restoration of that sanity of thinking and legal and historical perspective which the recent so-called world war has so seriously disturbed" (p. vii). He brings an unrivalled erudition and experience in international affairs to this task. Yet the facile use of historical illustrations, frequent pertinent quotation from the most varied sources, entertaining but pointed anecdotes, and occasional glimpses of broad philosophical perspective makes it easy for the reader to move with him.

Judge Moore does not believe that present conditions are exceptional in world history, nor that radical remedies are likely to prove effective. This philosophy he expresses by the term "relativity." The physicists have applied this term to a system based on the assumption that no physical laws have absolute validity but all are relative to the particular situation of the observer. This conception might be applied to social phenomena by the assumption that no legal principles are immutable but that all are relative to the present environment and character of the particular community which supports them. Judge Moore, however, means by relativity, the principle "that all things are relative, in the sense that they are to be considered not as isolated facts but as facts having relation to other facts, past as well as present" (p. 348). He apparently would urge his readers in the name of "relativity" to consider recent events and discoveries, the World War, the radio, rapid communication, etc., not as suitable bases for revising old principles and standards but as phenomena to be judged in the light of traditional principles. From its physical connotation one might expect relativity to be a radical doctrine—a revaluation of the past by the present. In Judge Moore's hands, however, it is a conservative doctrine, an estimation of the present by the past.

He illustrates his point of view by citing his own observation in the Orient of the regularity with which caravans were preceded by a donkey. On inquiry he received the reply that this singular leadership was thought by some to be for luck, by others for guidance. Though he notes some differences between man and the camel, Judge Moore evidently fears that many of his contemporaries prefer the type of leadership chosen by that animal (p. 352).

The articles in the book fall into three general groups dealing respectively with the law of war, international organization and jurisprudence. The discussion of the recent codes for aircraft and radio in war, which the author helped to draw up, and of contraband (written before the world war) are of technical interest to the international

lawyer but with the title article they serve to emphasize the author's opinion that retention of the distinction between combatants and noncombatants in the law of war is of fundamental importance. It is interesting to notice that on this subject extremes meet. Extreme pacifists and extreme militarists are both likely to visualize "absolute" war which attacks the civilian as well as the soldier. Their deductions from this conception of war, however, differ. The pacifist, convinced that under modern conditions war of necessity will lead to the starvation, bombardment and gassing of enemy civilians with the probable result of destroying civilization, thinks war must be abolished. The militarist, on the other hand, regarding war as an inevitable and valuable means of selecting the most advanced races for survival, does not wish such nations hampered by any artificial curbs to their dexterity. Between these two extremes are most practical jurists and military men who consider the distinction between combatants and noncombatants important; the jurists because it has been considered essential in international law and is required by humanity; the military men because they realize the practical dangers of retaliation and adverse neutral opinion if methods shocking to juristic and humanitarian sensibility are employed. The point of view of such moderates is ably espoused by Judge Moore.

The second group of topics consists of an optimistic article on the Permanent Court of which the author is a judge, a rather gloomy address of May 27, 1914 on the progress of arbitration, which he thought had on the whole been backward since 1794, and an address of December 1914 on law and organization. In this Judge Moore finds the chief defect of international society in a want of organization. He continues:

"The essential features of such an organization would be somewhat as follows:

"1. It would set law above violence: (1) By providing suitable and efficacious means and agencies for the enforcement of law; and (2) by making the use of force illegal, except (a) in support of a duly ascertained legal right, or (b) in self-defense. . . .

"2. It would provide a more efficient means than now exists for the making and declaration of law. . . .

"3. It would provide more fully than has heretofore been done for the investigation and determination of disputes by means of tribunals possessing advisory or judicial powers, as the case might be" (pp. 302–303).

The League of Nations seems to supply most of these features, but it appears not to have aroused great enthusiasm in Judge Moore. On January 31, 1924 he adds a postscript in which, while endorsing his remarks of ten years before, he emphasizes the difficulties in the way of peace and makes no mention of the League of Nations or its activities. Among these difficulties he notes the tendency of great states to assume unequal powers, the tendency to deny legal rights to states with unrecognized governments, the natural inclination of men to violence, the difficulty of coercing states by force, the tendency toward special coalitions to maintain balances or more often preponderances of power, the difficulty of limiting armaments. However, Judge Moore still concedes the necessity of international organization as a first step, but insists on the need of "a substantial and somewhat radical change in the mental attitude of peoples such as will lead them to think first of amicable processes rather than of war when differences arise" (p. 315).

The final group of topics includes addresses giving the author's philosophy of relativity, a proposal for a school of jurisprudence at Columbia University and an address of April, 1914 entitled "The Passion for Uniformity." The war-producing tendency of efforts to bring about uniformity, especially in religion and politics, is recalled and Judge Moore thinks the essence of international law lies in the "recognition of the right to be different" (p. 324). The value of uniformity within limits is, however, conceded, and efforts to codify international law and to secure the adoption of uniform laws on certain topics among the American states is mildly commended if such measures proceed neither too fast nor over too broad a field.

The book is full of material for thought and few readers will not profit by reflection on Judge Moore's well-considered opinions.

QUINCY WRIGHT.

University of Chicago.

International Law. By CHARLES G. FENWICK. (New York: The Century Company. 1924. Pp. xxxviii, 641.)

Waving aside the "searching discussion" of the questions and fundamental issues as more properly appertaining to a treatise on International Jurisprudence, Professor Fenwick considers it his task "to present international law as a positive system, and to distinguish as sharply as is feasible between such rules as have legal validity, in the sense that they are generally accepted, and such other rules as individual governments or writers, guided by altruistic or by selfish motives, have

asserted are or should be the law." But he does not tell us which steed he will ride in the case of conflict—the principle or the actual practice—for he adds: "The present principles and practices of the nations form thus a starting point: by them may be judged the legal validity of the claims made by states seeking to enforce their national interests as against the interests of other members of the international community." In point of fact with skilful rein he guides the pair abreast, and thus proceeding achieves to an admirable degree a treatise which incorporates the great body of state practice without discarding the currently accepted and reverently cherished principles and dogmas of international law. To use his own words: "The fundamental conceptions of international law are on the whole clear and precise. When, however, governments come to apply general principles to concrete situations a wide field is opened up for differences of interpretation, and usage is not always sufficiently clear evidence of the correct inference in the case. In consequence there are many branches of the law in which it is difficult to make explicit and definite statements. The lawyer may seek the precision of a legal code; the scholar must be content with a balanced statement of general, and at times conflicting, practice."

Upon this platform the present outline is presented as a "text rather than as a general treatise." As might be expected from the preceding quotation the organization of material is characterized by a marked inclination to conservatism, but at the same time the author has very carefully considered the interrelation of every part and made certain improvements on the work of his predecessors, notably in regard to the discussion of the doctrine of state equality.

Instead of dividing the text fairly evenly between war and peace, Professor Fenwick only allows war and neutrality combined a little over one-third of the space devoted to peace. But although he makes an effort to confine the abnormal relations of war in proportion to their importance as compared to the everyday relations of peace, he does not fall into the emotional extreme of anathematizing war and denying to it any place in a study of the law between nations. Instead, he regretfully records the fact that war is the ultimate and legally recognized means of enforcing international rights when unjustly denied, and he includes both war and neutrality under Part IV: "International Procedure for the Protection of Rights."

By using the somewhat general and indefinite term of "protection" instead of "enforcement," the author, in conformity with his prefatory statement, lessens the emphasis upon the sanction of international

law and is enabled to include a few preliminary pages on the "peaceful procedure" of settlement such as negotiations, mediation, and arbitration. It is somewhat surprising that this important chapter should be limited to a bare score of pages and that the discussion of reprisals which follows should be still more skimped.

If we omit from comment the carefully prepared and instructive historical introduction, there remain Part II, devoted to the law relative to "The Persons of International Law," that is, membership in the community of nations and the acquisition and loss thereof, and Part III, "Substantive International Law." That such a classification presents great difficulties must be agreed. By way of evidence we may note the discussion under the rubric of "Substantive Law" of such essentially procedural topics as "the right of self-help," "pacific measures of redress," and "the form of redress" (pp. 381-5).

Professor Fenwick has not attempted to construct a system which would reconcile all such contradictions, but rather to build upon the somewhat disjointed and even contradictory foundation-stones of the generally accepted system of international law. His purpose in so doing would seem to be to secure a text which will preserve such unity as is compatible with sincerity of expression and a reasonable adherence to formulated state practice. This method is evidently well calculated to provide the student with a framework or guide for his own studies. If this be the purpose it has been well accomplished, and as a college textbook the volume should possess the added value of stimulating to further research. To this end also will serve the admirable list of "Select References" or arranged readings to accompany each chapter and each of the consecutively lettered side-headings into which the chapters are divided. By this happy device the author has avoided incumbering his pages with a top-heavy mass of notes intended to support or controvert his own conclusions.

Instead of the heterogeneous collection of Hague Conventions and the various codifications which are usually to be found in the appendices of works on international law, Professor Fenwick has included only the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice. These documents conveniently supplement the discussions of the League of Nations and the Court of International Justice, which are treated under the appropriate sections with an admirable spirit of measure and fair-minded objectivity.

In form and in content this volume is a credit to American scholarship. It will serve as a stepping-stone by which the student of international relations may reach a better understanding of international law

—that law which tends to keep the peace between nations. By this test every rule and every formulation of principle must stand or fall.

ELLERY C. STOWELL.

The American University.

The Freedom of the Seas in History, Law, and Politics. By PITMAN B. POTTER. (New York: Longmans, Green and Co. 1924. Pp. xvi, 299.)

Few questions of international law have been the subject during the past three centuries of greater diplomatic controversy or theoretical discussion than that of the "freedom of the seas." As Professor Potter rightly says, the phrase has meant many things to many men, and, indeed, different things at different times. Seventeenth-century controversies over liberty of navigation and trade in time of peace gave way to eighteenth-century controversies over the rights of neutrals in time of war. The nineteenth century introduced numerous additional questions in respect to international rivers, straits and canals, and a special question in connection with the suppression of slavery; while the twentieth century brought to the front the larger issue of the connection between the freedom of the seas and the organization of the society of nations as a whole.

The present volume is, therefore, not only a timely study of an existing problem of international relationships but a useful contribution to the history of international law in one of its important phases. Part I is devoted to a history of the disputes relating to the freedom of the seas and contains an elaborate chapter, based upon an earlier doctoral thesis, of the Grotius-Selden controversy. This is followed by a sketch of the emergence during the eighteenth century of the question of belligerent rights and the shifting of the grounds of dispute from times of peace to times of war.

In Part II Professor Potter surveys the actual conditions existing in 1914 in respect to the freedom of the seas. This part completes the history of the subject and contains a survey of the law of territorial waters, the law of war at sea, the law regarding piracy, slave-trade, and navigation, and the effect of the World War upon the freedom of the seas. In discussing the last-mentioned topic the author emphasizes that it was the fundamental change of circumstances that made the law of naval warfare as it stood in 1914 ineffective during the World War.

The issues raised in Part III dealing with "the political problem of the freedom of the seas" are those of chief interest at the present day. The

author contrasts the policies of continental and maritime powers in respect to belligerent rights, defining the two groups on the somewhat arbitrary basis of the extent of their maritime interests. The reviewer finds this portion of the work somewhat theoretical and is of the opinion that the subject might have been more clearly presented if the policies of the several leading powers had been treated individually and specifically. In a final chapter the author indicates the solution of the problem presented by these conflicts of policy between continental and maritime states. The obstacles to an adjustment upon the old ground fought over at the London Naval Conference are forcefully reviewed, and the conclusion is reached that only "by going to the roots of international war" can the demands of the powerful maritime state be effectively checked. Nothing less can serve all the interests involved than a general guaranty of security, to be obtained by "Anglo-American coöperation and general international organization for the suppression of international war entirely, and the substitution therefor of international government in a League of Nations". The case is here put in its true light. A new Declaration of London, built upon new compromises, would under similar circumstances share the fate of the Declaration of 1909.

The value of studies such as the one under review cannot be too greatly emphasized. Quite clearly, if international law is to be codified, it must be codified first in its separate parts one by one; and the codification must be an elaboration of new rules as well as a restatement of existing ones. When governments are ready for such an undertaking their delegates must turn first of all to the preliminary investigations of scholars.

C. G. Fenwick.

Bryn Mawr College.

British-American Relations. By J. D. Whelpley. (Boston: Little, Brown & Co. 1924. Pp. vi, 325.)

Our Foreign Affairs. By Paul Scott Mowrer. (New York: E. P. Dutton & Co. 1924. Pp. xii, 348.)

A Short History of International Intercourse. By C. Delisle Burns. (New York: Oxford University Press. 1924. Pp. 155.)

Mr Whelpley's volume might be called a meditation upon British and American institutions, policies and life in general. There is evident no insistent desire to procure the reader's support for an immediate Anglo-American alliance or entente but the purpose quite clearly is

to assist Britons and Americans to know one another better and to consider the advantages of coöperation. The author concludes: "It is the logical destiny of the British Empire and the United States to draw ever closer together in the discharge of their international activities and responsibilities."

Somewhat casually the discussion presents a number of important and a considerable number of rather trifling reasons for the failure of genuine cordiality to develop between the British and the Americans. In one field, that of diplomacy, the decision of the Labor government to give Parliament an opportunity to consider agreements pending will do something to relieve the handicap of suspicion under which the diplomacy of the war left the Foreign Office. Perhaps the strongest influence for coöperation is that suggested by Professor Bonn at Williamstown: "London has the experience and New York has the cash."

A number of chapters are given to the history of relations between the United States and the British Empire. One of the most interesting features of these chapters is the author's interpretation of the position of Canada in the empire and of her attitude toward the United States. As to the former he says: "Through the making of a treaty with the United States in 1923 . . . the seal was set upon Canadian independence." As Professor Keith recently has so clearly pointed out, Canada's autonomy has in practice been expanded to cover the negotiation of treaties affecting her own interests, but this fact is by no means tantamount to individual action on matters affecting Canada as an imperial unit. Mr. Whelpley also has this sentence with reference to the failure of the reciprocity treaty in McKinley's administration: "Thus passed the greatest opportunity ever presented the United States for the economic annexation of Canada, which would probably have led in a short time to political annexation by the will of the Canadian people." These statements and the quotation, apparently with approval, of a British writer's extravagant conclusion that: "It is grossly and palpably evident . . . that the League is a British firm"do greater credit to the author's sincerity than to his political knowledge or his judgment in the selection of evidence persuasive of the coöperation he seeks.

Mr. Mowrer, the author of *Our Foreign Affairs*, believes that "in our great and true democracy it is the people themselves who are at last supreme, even in foreign affairs." His book is written to assist in keeping alive the popular interest in foreign affairs aroused by the war, and to provide a readable statement of what people ought to

know and of how they may use their knowledge to form sound opinion for the guidance of the department of state and the foreign service. It reveals in its author a wide knowledge both of world politics and of the agencies by which diplomacy is carried on and influenced. Interestingly, if uninspiredly, written, in short chapters, with no evidence of an axe to grind, the book justifies its title and deserves the attention of those for whom it has been prepared.

"The history of civilization is mainly a history of man's outlook and man's emotions, not of man's possessions." Thus Mr. Burns introduces his rapid, original survey of the influences which peoples have exercised upon one another. In a hundred and fifty small pages he passes by periods from the early middle ages to the hopes of the future, making his contributions as he goes rather in the simplicity of his style and the vividness of his examples and illustrations than in matters of fact and interpretation. His civilization is a universal one, drawing its inspiration from Italy and France, from China and Arabia, quite as eagerly as from the lands of the "Nordics." It finds itself today only in its infancy.

Mr. Burns does not neglect the power of economic forces in national evolution, but he does not accept the "dull dog in a Rolls Royce" as "sufficiently distinct from an anthropoid ape to be called civilized." He assumes that "a civilized man will have an ear for music and an eye for the plastic arts and a wit for literature," that he "will have an eagerness for new knowledge and . . . a scientific mind" and that "he will not be cramped by material circumstances." Consistent enough, then, his view of the present stage of civilization as infantile.

He agrees that we are now witnessing a "race between catastrophe and education," whence the value of books which will educate peoples to an appreciation of what peace in the past has allowed them to draw from one another. The protagonist of "abolishing armies and navies or making the rich and the poor love one another" has Mr. Burns' sympathy, but his own purpose is different. "Vague sentiments of friendship are not such good bases for peace as the general appreciation of what we have gained from international intercourse in the past; and what will make peace most secure is the general sense that everyone will lose if the peaceful intercourse between nations is interrupted. The immediate policy of peace, then, is to increase intercourse and coöperation so greatly that no one will be willing to forfeit the benefits derived from such intercourse." On the high plane of this author's treatment such a purpose is likely to be fruitful.

HAROLD S. QUIGLEY.

University of Minnesota.

The Foreign Policies of Soviet Russia. By ALFRED L. P. DENNIS. (New York: E. P. Dutton Company. 1924. Pp. xiv, 500.)

In his preface the author states that: "This is a pioneer attempt to tell the story of the international relations of Soviet Russia, 1917–1923 (with the countries of Europe, Asia, and America). . . . In substance I attempted to conduct what was really an 'undress rehearsal' of the main points of the book in my Round Table on 'Foreign Policies of Soviet Russia' at the Institute of Politics at Williamstown in the summer of 1922. Later at Clark University in 1923 I made use of much of the material in lecture form."

Professor Dennis has marked the trail which will guide others who will follow him in this field. The book is, what the author claims it to be, the "undress rehearsal" at Williams, worked into a course of lectures at Clark, hastily revised and brought out at Dutton's. Had more time been spent on it the book would have been more scholarly and less bulky. It would not have contained so many generalities, and such well-known statements as that the Bolsheviki are not democratic and that their aim is to overthrow capitalistic governments. The reviewer is not an admirer of the Bolsheviki but whatever we may think of them we must admit that they are consistent, determined, realistic and to refer to them as "soap box" orators and to their ideas as "clap trap" shows a lack of an objective point of view. Frequently the author makes statements on insufficient knowledge and doubtful evidence. "The Bolsheviki, who were the left wing of the Social Revolutionary Party, had vainly attempted an armed revolt in July, but three months later had talked themselves into control." The Bolsheviski were not Social Revolutionists, Lenin and his lieutenants were opposed to the July rising, and they did something more than talk to get control and to stay in control.

"The quality and interest of the story" says Professor Dennis, "have been relieved by the liberal use of quotations from notes, speeches, and articles by Soviet leaders and from the Bolshevik press. These at least have the merit of reality." Quotations of this kind are so numerous that they give a journalistic tone to the book. As the reader labors through them he sometimes has to stop to make out their meaning, tries to guess the reason for their being there, and to discover the "merit of reality." Take, for example, the following: "Over these (Letts) were the landowners who were chiefly German by descent; 'colonists and squires surrounded by an alien race . . . themselves the vassals of alien princes who might be of an alien faith'; they had shown in time past a 'martial and adventurous spirit' " (p. 121).

Notwithstanding some of its shortcomings, the estimate of the work by the publishers is quite accurate: "If any book written on Russia since 1917 is to be considered authoritative, undoubtedly this is the book." Serious students who wander over this trail of "pioneer account" with eyes and ears open and with a compass in hand will find this book a very great help. They would do well, however, to take along one or two Bolshevik guide-books, such as Karl Radek's work in the same field.

F. A. GOLDER.

Stanford University.

Select Documents Relating to the Union of South Africa. Edited by ARTHUR PERCIVAL NEWTON. (London: Longmans, Green and Company. 1924. 2 volumes. Pp. xxviii, 281; viii, 291.)

The editor of this collection of documents relating to the creation of the Union of South Africa has gone only to official papers in print. The two small volumes contain seventy-eight documents and begin with the abortive attempt made in 1859 by Sir George Grey, Governor of Cape Colony, to bring about a union of the colonies, and end with extracts from the debate fifty years later in the British House of Commons on August 16, 1909, when the bill embodying the Constitution of the Union of South Africa was approved by that body. There is nothing, as the editor says, from "controversial literature, private correspondence and the newspaper press" to suggest the atmosphere in which the papers were produced. The collection does not include the Act itself. We must with reluctance say that the editor's task has not been discharged very adequately. There are practically no notes to enlighten the student not already conversant with the details of South African history.

The Introduction contains a few *obiter dicta* about the study of history, but no guide to the reader such as that given in Professor Egerton's admirable introduction to his volume on the *Federations and Unions within the British Empire* published in 1911. Quite obviously this book has been prepared with superficial haste. It is useful, but the editor has furnished the minimum of help. One would hardly know from these papers that between the time when the egregious Mr. Froude went out in 1876 to put the colonial statesmen in their place in the political nursery to the creation of the Union in 1909, some thirty-three years, South Africa was the scene of the greatest war which Britain had engaged in since the days of Napoleon and that there were

such events as the disaster at Majuba and the Jameson Raid. Yet these events helped to create the public opinion which shaped the Constitution. The national Union and its Chairman, Mr. Charles Leonard, had some place in the political life of South Africa, but of these nothing. We have the names of men of striking personality, Presidents Brand and Kruger; of governors, such as Sir George Grey, Sir Bartle Frere and Lord Milner; political leaders such as Molteno, Rhodes and Jameson; but on them we get no light from the editor.

That this superficial book should be issued is a pity, for it will quite possibly prevent the issue of a better one. Books are dear and publishers sometimes timid. But to do the work well would be a fascinating task. The Union of South Africa is a triumph of statesmanship. It is a Union rather than a federation and it was created in spite of fierce local jealousies. The smaller states, Natal, the Orange River Colony, and the Transvaal, feared that union would make the more populous Cape Colony dominant, as Prussia was in Germany. The Dutch feared the imperialism of the English. There were difficulties about tariff, railways, the use of Dutch as an official language, the right of the natives to a limited vote in Cape Colony, but strenuously denied in the other colonies, the republican sentiment which would have copied the Constitution of the United States rather than the parliamentary government of Great Britain, the situation of the capital, the relations with the government in London. These problems were solved by wise compromise. The story is one of vivid interest for other political societies. Some but not all of it can be gleaned from these volumes.

GEORGE M. WRONG.

University of Toronto.

Modern Democracy in China. By MINGCHIEN JOSHUA BAU. (Shanghai: Commercial Press, Ltd. 1923. Pp. vii, 467.)

This is one of a growing number of serious books on China published in that country. The volume presents: (1) a survey of the political history of China since the revolution of 1911, together with some mention of the proposals for a constitutional monarchy under the Manchus, and (2) a study of the sort of government best suited to the Chinese people, including a proposed constitution for China drawn up by the author. This second task is a courageous attempt to reduce the constitutional problems of China to a form comparable with similar problems in the other important countries of the world. As a result of this method there is a touch of unreality about the author's conclusions in

the field of constitution-making which is to some extent relieved by the conclusions in the field of history. Compare, for example, the unreality of the chapter on a "National Convention" (Chapter 26) with the very real difficulties presented in the chapter on the "Abolition of the Tuchun System" (Chapter 9). The book is marred by numerous typographical errors and by an awkwardness in the use of the English language. Since its publication China has added to the documents of her troubled political history by adopting a later constitution which was promulgated on October 10, 1923. This new constitution seems to be a product of the method which Dr. Bau makes use of and it is perhaps unavoidable that, for the present, the countries of the East should give undue importance, in drawing up constitutions, to the legal devices of the West. Chinese students of government ought, however, to have in mind the possibility of an independent contribution on the part of their country to the solution of the world's difficult problem of self-government.

C. F. Remer.

Williams College.

Labor Disputes and the President of the United States. By Edward Berman, Ph.D. Columbia University Studies in History, Economics and Public Law. (New York: Longmans, Green and Company, 1924. Pp. 284.)

The purpose of this monograph is, as given in the author's introduction, to describe the activities of the President in connection with labor disputes; to estimate their effectiveness and fairness, and finally, to suggest the presidential program best suited to the prompt, effective and just treatment of the problems which arise in connection with nation-wide strikes. Accordingly, Dr. Berman discusses chronologically the activities of the chief executive in whose administration labor disputes have arisen. Beginning with President Cleveland and the Pullman Strike of 1894, Chapter II is given to McKinley's handling of the Coeur de'Alene disturbance; Chapter III discusses Roosevelt's dramatic rôle as mediator in the famous anthracite coal strike of 1902, and his association with lesser labor controversies; the three following chapters deal with President Wilson in connection with labor disputes. The book concludes with a chapter on President Harding and the labor controversies still fresh in our memories.

Considering the executive in his relation to labor disputes as a whole, the work of Presidents Cleveland and Roosevelt stands out most significantly, since it was they who inaugurated the precedents to be followed by their successors. As Dr. Berman points out, the chief importance of Cleveland's association with the Pullman Strike lay not so much in the fact that the President intervened, nor that he sent federal troops to the scene of action, but in the fact that the President, "by obtaining an injunction unparalleled in scope to end the strike, inaugurated a precedent of serious import to labor." Although mentioning the tremendous importance of the President's action, Dr. Berman neglects to point out specifically the novel basis set up by the Supreme Court in justification of the injunction. Equity, said Mr. Justice Brewer in the Debs case, only interferes for the protection of property. The government clearly had a property right in the mails, but the court was not content to rest its case on this ground alone: "The obligation which every Government is under to promote the interest of all and to prevent the wrong-doing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in the court." We have the authority of ex-President Taft for the proposition that this case justifies the use of the injunction to secure the protection of "any wide-spread public interest" entrusted by the Constitution to the federal government. The broad scope of power which this development places in the hands of the executive is self-evident when one realizes that the President, may, without request from state authorities, send troops "if he thinks it impossible to enforce . . . the orders of the Federal Courts by means of the usual judicial proceedings" (p. 207).

The peculiar significance of Roosevelt's participation in labor disputes was of an entirely different character. He had no authority of a legal nature to intervene and attempt to settle the anthracite strike, but the country as a whole demanded it and his unusual success as mediator in this dispute brought the public to consider the chief executive as their representative whenever the general welfare was menaced. Thus, there was established a precedent for Presidential intervention of an extra-legal character.

The chief criticism which one may offer of this volume is that it is too detailed. Attention is also directed to the following statements which may prove misleading. Speaking of the Sherman Act, Dr. Berman says: "Every one who knows the history of that act is aware that the sole intent of its framers was to find some means of restricting

the pernicious activities of trusts" (pp. 31, 32). A reading of the congressional debates leads to the conclusion that the intent of the framers of this measure was to strike at all combinations, whether capital or labor, whose activities actually restrained trade among the several states. The statement (p. 121) that "the Clayton Act exempted labor unions from the provisions of the Anti-trust Laws," is erroneous. Finally, Dr. Berman apparently would criticize (p. 29) the action of the federal government in connection with the Pullman Strike on the score that "there was no federal law forbidding a sympathetic strike, nor was there one the intent of which was to forbid a railroad strike." True enough, but was there not a law securing property rights, a law authorizing the government to operate the mails, a law by which the regulation of interstate commerce is vested in the general government, and a host of other laws sufficient to lend legal justification to the action of the government?

It was not to be expected that much new light could be thrown upon a subject already fairly well treated in magazine articles and secondary works. Rather this study is noteworthy as the first scholarly account of the part which the President has played in labor disputes. Excellent source materials have been used, especially official government documents. The narrative is coherent, well-written and displays painstaking investigation. It would prove very helpful as collateral reading in history and economics courses.

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Samuel Adams. By RALPH VOLNEY HARLOW. (New York: Henry Holt & Company. 1923. Pp. x, 363.)

The sub-title of this latest biography of "the chief incendiary" frankly states its distinguishing features,—"A Study in Psychology and Politics." To a public charmed by the essays of Gamaliel Bradford and Strachey this attempt to find in Adams' "inferiority complex" a satisfactory explanation for his irrational and persistent opposition to British rule will make some appeal, but to students of politics and of the history of the Revolutionary period the elimination of the psychological factor would prove no detriment. And this is especially true when the book is regarded as a study in politics rather than as a mere biography, for the psychological aspect is limited to Adams himself and not extended to other characters whose parts are admittedly quite important to the presentation of the drama and whose

relations to Adams in the successive crises form a vital part of the study of the politics of an intensely political period. In fact it is in showing the relations between Adams and such other leaders among the Boston Whigs,—especially Otis, Rowe, Warren and later Hancock—that much of the value of the present work consists.

While there is no pretense of disclosing "hitherto unpublished" material, the author's use of contemporary correspondence, and especially the files of the *Boston Gazette* and the less familiar *Worcester Spy*, is judicious. Particularly interesting to readers of J. T. Adams' *Revolutionary New England* and to adherents of the Charles A. Beard school, is the limitation which Professor Harlow's analysis of contemporary material places on the sources of Samuel Adams' support among the several classes in New England,—the merchants, the mechanics of Boston, the small farmers of the back counties—showing that these varied greatly with each successive crisis and that it was only in the period of conservative reaction, 1769–1773, that the latter group came to be regarded as the chief supporters of the persistent radicals.

Perhaps the most interesting chapters deal with Adams' distinct service to the cause of separation by the propagation of a popular political philosophy during the period of conservative reaction above noted. Here is shown how through his own contributions to the radical press as well as through articles by relatively unknown disciples, Adams succeeded in creating in the popular mind a growing conviction that all colonial grievances were part and parcel of a policy of oppression wickedly conceived by a tyrannical ministry. Unsound as this theory admittedly was, inconsistent as its statement may have been, its effect was important. Not from the point of view of political theory, as Professors McIlwain and R. G. Adams have since so convincingly traced it in the works of the greater revolutionary pamphleteers, but from its purely political and opinion-forming effects this formulation by Samuel Adams of a popular political philosophy is shown as a vital factor.

Adams' failure to function as a leader in the legislation of the Continental Congress after the Declaration of Independence, or as a constructive statesman in the constitutional period after the war, or later as the chief executive of his own commonwealth, is explained, though not excused, on the ground of lack of real ability except where political opposition to Britannic tyranny offered a field for his self-expression prompted by the urge of the old "inferiority complex." It is to be

regretted that the author was content with this, rather than in giving us a more careful analysis of Adams' relation to the factors opposing the ratification movement in Massachusetts.

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BRIEFER NOTICES

Teachers of general courses in American government, national and state, as well as the hosts of students who have been "brought up," so to speak, on Charles A. Beard's *American Government and Politics* (Fourth edition, The Macmillan Company, pp. x, 820) will welcome warmly a completely revised edition of that valuable and useful book. The book has been almost entirely rewritten, and in some parts wholly recast. As a concession to those teachers who believe that a theoretical foundation in the general principles of political science offers a more desirable approach to American government, Professor Beard has prepared a general introduction in three chapters. It is, however, not a mere summary of abstract political theory, but has particular reference to many of the underlying problems of our own government and prepares the student for the more detailed presentation of the subject which follows.

The first chapter emphasizes the aspect of the government as the one great social institution seeking to serve all, and in so doing moving slowly or rapidly in response to the varying demands of the body of citizens. Chapter II deals in a particularly satisfying way with the general aspects of the political party, the complex forces out of which it grows, is sustained, and perpetuated. Chapter III deals with the modern science of administration and the problems connected therewith. The historical material in the earlier editions has been entirely rearranged. Those portions dealing with the colonial origins and historical development of the state and local governmental institutions have been transferred to Part III where they more logically belong. Those portions dealing with the development of the Union and the national government have been condensed into one chapter. One notes in passing that in tracing the steps in the formation of the Union the author still omits mention of the Committees of Correspondence. One may also feel inclined to doubt that the chapter on the national administration should have been transferred to its present position after the Judiciary.

The last chapter of Part II, dealing with the general subject of federal subsidies and the steady encroachment of the national government upon the reserved powers of the states, is new. It seems to the reviewer to clearly belong to Part III, dealing with state government. This would have become still more evident, had the author at this point developed the theory of the place of the state in our system of government. On some such background the tendencies outlined in the chapter referred to might have come to appear alarming. As it is, little attention is paid to this important characteristic of our system of government—one which many believe it is necessary to maintain. Except as indicated, no fundamental changes have been made. Much new material has been brought in, however. Most of the chapters have been more or less rewritten and all have been brought up to date.[1]

Professor Hans Delbrück's lectures, *Government and the Will of the People* (Oxford University Press, pp. xiii, 192), translated by Roy S. MacElwee, were delivered at Berlin University in 1913. In an epilogue written in 1920 Professor Delbrück attempts to reconcile his former praise of the German "constitutional government" with the facts of the post-war Reich. His criticisms of democratic parliamentary government are still as strong as ever; he finds in the powers of the President, the referendum, and the Economic Council some checks to its complete expression in the constitution. His lectures contain much able analysis of the parliamentary system as it functions in different countries. He quotes with restrained approval the strictures of Faguet and Belloc, and discusses incisively and with a wealth of illustration the majority system (5 ff.), proportional representation (15 ff.), the "oligarchy" of party organization (56 ff.), etc. But despite valuable and often brilliant discussion of the party system in particular, he becomes quite uncritical in his advocacy of the German pre-war government. The absence of an index reduces the usefulness of the volume, and while the translation is in the main well done, it is marred by occasional pedantic phrases.

Volume one of *An Ambassador's Memoirs*, by Maurice Paleologue, last French Ambassador to the Russian Court (George H. Doran Company, pp. 350) covers by means of a day-to-day account, the period from July 20, 1914, to June 2, 1915, in a vivid and sympathetic

[1] By N. H. Debel, Goucher College.

manner. While emphasizing Russia's need of Tsarism and, at the same time, the slender attachment of the people to the really un-Russian Tsar, autocratic but actually impotent, the case for revolution makes itself felt with increasing clearness when one considers the intrigues of the court, the general conduct of Russian affairs, and the inherent qualities of the Russian people and their peculiar nationalism. The character sketches of the Tsarina, Tsar, Grand Duchess Elizabeth, Grand Duke Nicholas, generalissimo of the Russian armies, Rasputin, and Count Witte, are especially interesting and well done. The book traces the general progress of the war, as well as the particular march of events in Russia. As to the origin of the war, the writer, as would be expected, places entire blame upon the German Emperor. Russia's chief aim, after supporting her French ally, was to safeguard further the Straits by possession of Constantinople.

Mr. Arthur MacCartney Shepard, in his book on *Sea Power in Ancient History* (Little Brown and Co., pp. xxx, 286) says: "In two great crises in ancient history—in the Persian Invasion of Greece, and the Punic Wars—sea power played the decisive and controlling part." The author of *The Influence of Sea Power Upon History* wrote thirty years earlier, "There cannot now be had the full knowledge necessary for tracing in detail the influence of sea power upon the issue of the Second Punic War, but the indications which remain are sufficient to warrant the assertion that it was the determining factor." The differences in these two statements concern details, not final results. The author first describes the warships, personnel, sea-training, administration, tactics and strategy of ancient sea warfare, and then devotes his attention in turn to Greece and Rome. For Greece, he starts with the Graeco-Persian War, 499 B.C. and ends with a note on the naval policies of Philip II of Macedon and Alexander the Great. For Rome, the period covered is from the first Punic War to the destruction, by Gaiseric, of the great Roman Fleet assembled "under the banner of the Eastern Emperor Leo." The author's evaluation of the influence of sea power on ancient history is based largely upon the opinions of ancient historians. His work has been painstaking, and he has treated his subject in a most interesting way. The book is planned primarily for civilian readers interested in historical literature.

The first volume of *The Naval History of the World War* by Captain Thomas Frothingham, U. S. N. (Harvard University Press, pp. xi, 349)

gives every indication that the entire series will be one of the foremost historical accounts of the part played by navies in the World War, and hence, one of great value to students of naval science. The accuracy of the statements and data presented are beyond question, as the work has been compiled from data provided by the historical section of the United States Navy Department. In addition, the author has drawn freely from the writings of English and German writers of authority, including those of the naval historian of the British Navy. This interesting compilation shows well the value of logistics and contains much food for thought on naval strategy. A thorough reading of this history will help toward rendering less difficult some of America's possible future problems in the Pacific and Atlantic.

De Dominio Maris Dissertatio by Cornelius Van Bynkershoek, (Publications of the Carnegie Endowment for International Peace, Oxford University Press, 1923) is a reproduction and translation of the second edition (1744). The renewed interest in the law of the sea, particularly in the law relating to marginal waters, makes this issue of Bynkershoek's work timely. This dissertation, first published in 1702 before Bynkershoek was thirty years old, has made his name known wherever the law of the sea is known. The maxim that "the control of the land over the sea extends as far as a cannon will carry" appealed to the mind of mankind as a sane basis for claim to jurisdiction. The range of a cannon in Bynkershoek's day was about three miles and this distance became more and more the recognized limit of shore control. Few books of less than seventy pages have had such influence, and it is of great service to have this dissertation available among the Classics of International Law.

The Division of International Law of the Carnegie Endowment for International Peace has brought out a volume on *Arbitration Treaties among the American Nations to the Close of the year 1910*, edited by William R. Manning (Oxford University Press, N. Y., pp. 472) in which the English texts of 228 arbitration treaties between American states are printed. About 85 of these treaties provide for general arbitration, while the remainder are for specific arbitrations, such as claims and boundaries. The text of three inter-American treaties is given, including the treaty of January 1902, between eight Latin American countries which provides for the arbitration of all disputes which do not affect national independence or national honor. But article II of this

treaty stipulates that these exceptions shall not be interpreted to include disputes in regard to diplomatic privileges, boundaries, rights of navigation, or the interpretation of treaties. At the same time sixteen Latin American countries and the United States signed a convention for the arbitration of pecuniary claims. This compilation of treaties should be of great value to the student of arbitration and of international law.

Two recent volumes on the late President Wilson are David Lawrence's *The True Story of Woodrow Wilson* (George H. Doran Company, pp. 368) and Josephus Daniels' *The Life of Woodrow Wilson, 1856–1924* (Copyright by Will H. Johnston, pp. 381). These books differ in method and scope as might be expected from their writers,—one a journalist, with eighteen years' association with Mr. Wilson, and the other an appreciative colleague and friend. The former, using first-hand information and materials, seeks to set forth the true and unpartisan story of Woodrow Wilson as a political figure and especially as the President of the United States during and immediately after its participation in the Great War. On the other hand, Mr. Daniels has undertaken, as a "labor of love" to supply for Mr. Wilson's admirers, as soon as possible after his death, an account of his life and services—so that there is scarcely more emphasis upon the war president than upon his early life and the other aspects of his attainments. In both are to be found a sympathetic treatment and full appreciation of Woodrow Wilson's contributions, but Mr. Lawrence's account will prove more interesting to the student of constitutional government and international politics.

There is some danger perhaps in reading too much into the words of men in the light of events happening a decade or so after their utterance. Bearing in mind such limitations, however, the reader is almost startled to find how vividly President Wilson revealed the principles and the ideals of public service which later governed his public actions in an address delivered at the University of North Carolina in 1909. The address has now been published by the University of North Carolina Press in a small booklet entitled *Robert E. Lee: An Interpretation* (pp. 42).

Dr. Isaiah Bowman has, in the *Supplement to the New World, Problems in Political Geography* (World Book Company, pp. 112), brought materials of his earlier volume up to date and has given particular attention to the United States in the new chapter thirty-five. He says

"No government at Washington can afford to leave either the land question or foreign policy to itself or to so-called natural forces." The notes on various chapters and new maps give some of the most recent materials upon world readjustments.

Dr. Charles H. Levermore's volume, *League of Nations, Fourth Year Book*, (Brooklyn Daily Eagle, pp. 428) will receive more than usual attention because Dr. Levermore won the Bok Prize. As in earlier volumes, the work of the League of Nations is reviewed. In the appendices there is given a resumé of the Greco-Italian controversy, a summary of the official and unofficial coöperation of the United States with the League, and the winning plan in the Peace Prize Competition.

The Great Betrayal by Edward Hale Bierstadt (Robert M. McBride Co., pp. xvi, 345), purports to be a "candid and impartial presentation of the real facts in the Near East situation of today." The author states in his preface that he gives his "verdict in favor of the Christian minorities and against Turkey" because "the evidence admits of no other conclusion." The verdict is not changed throughout the book and the author has collected much evidence to substantiate it. He doubtless knows, though he leaves his readers in ignorance, of how much and how convincing proof has been amassed on the other side.

The Separation of Executive and Judicial Functions by R. N. Gilchrist (University of Calcutta, pp. iv, 240) is a scholarly study of the evolution and present-day organization of the administrative and judicial services in India. The author points out that in India there has necessarily been a fusion of executive and judicial functions in the same hands but that with the growth of self-government in recent years there has been a demand for a separation of powers. Professor Gilchrist is of the opinion that the Rule of Law will not produce satisfactory results under conditions that exist in India and therefore suggests as a practicable line of reform the possibility of adapting the system of administrative law to that country.

Spain Today by Frank B. Deakin (Knopf, pp. vii, 221) is somewhat different from the usual run of books dealing with this country. Instead of writing about the art, literature, history, and the beauties of Spain Mr. Deakin has turned his attention to the presentation of facts

concerning education, health, housing, politics, administration of justice, agrarian problems and the press. There is also a brief chapter on "The Military Directorate" although most of the essays deal with conditions prior to 1923. The book with its picture of popular discontent and dissatisfaction gives, on the whole, a rather depressing description of affairs in Spain.

English Society in the Nineteenth Century As Influenced From Overseas by J. B. Botsford (The Macmillan Company, pp. 388) is a pleasant book as well as a scholarly one. The eighteenth-century flavor is enhanced by numerous quotations which the author uses skilfully. One of the attractive features of the book for the general reader is that the footnotes, which the erudite seem to demand as a mark of true scholarship, are gathered together at the end of the different chapters where they do not clutter up the pages and do not distract both mind and eye in reading.

The Labour Party's Aim: A Criticism and Restatement (Macmillan Company, pp. 96) is an anonymous tract purported to be written by seven members of the English Labour Party, which indicts the party (as it existed in 1923) because it is content with "Reformism." The tone of the book is good but the ideas are only loosely connected and the analysis is mostly superficial.

From the standpoint of the student of government the most interesting feature of Jens P. Jensen's *Problems of Public Finance* (Thomas Y. Crowell Company, pp. xviii, 606) is the emphasis placed on fiscal administration. Five chapters are devoted to this subject, covering such topics as fiscal administration of the United Kingdom and of the United States; the administration of state and local finance; budget-making; collection and custody of public funds, and practical tests for determining the efficiency of government. In discussing the latter topic the author points out that the existence of inefficiency in government can be determined to some degree by presumptive evidence such as the tax rate, amount of tax, amount of delinquent taxes, the extent to which the budget plan is followed out, etc., but that "before we can measure the degree of inefficiency and set up standards of efficiency, we must determine standard costs of the several parts of the service. . . . On such costs we may increasingly base our judgment

concerning the efficiency of public service in the future." The establishment of standards for measuring the efficiency of government is of vital importance, but unfortunately the problem is complicated by even more obstacles than those mentioned by the author in his well-guarded conclusion. The book also has an interesting chapter on the financing of state highways.

Sir Isaac Pitman and Sons have published two excellent books which contain material of interest to students of English government. *Rates and Rating* (pp. xvi, 310) by Albert Crew, assisted by W. T. Creswell and Arthur Hunnings, describes in detail the law and practice of local taxation in England. There is a brief historical introduction, a full table of statutes and cases and an elaborate appendix containing digests of the principal statutes, practical suggestions in regard to valuation and numerous tables and forms. *Social Administration Including the Poor Laws* by John J. Clarke (pp. viii, 364) is a careful exposition of the English Poor Laws from early times down to the present, together with a complete account of their administration by both the national and local authorities. The book closes with two chapters devoted to recent problems, especially post-war unemployment. The author is extremely critical of the existing system of unemployment doles. Both books are highly commendable from the standpoint of form and substance.

The Government of Oklahoma (Harlow Publishing Company, pp. x, 678), by F. F. Blachly and M. E. Oatman, is written, as the preface suggests, in contemplation of the calling of a constitutional convention in that state. With that idea in mind, the authors have given particular attention to criticising the present organization of government and to recommending changes. These recommendations will at least form a basis for discussion, whether or not one agrees with the suggestions. The book has been carefully written, so far as detailed attention to provisions in the constitution and the laws and to judicial interpretation, is concerned. It does not, however, seem quite as readable as Dodd's *Government of Illinois*, and lacks the popular appeal which the charts and diagrams give to the latter text. There are, too, some apparent inconsistencies in the book, due perhaps to the fact that several authors collaborated in its production. But we need more of such studies as this if we are really to educate our state citizens in matters of government.

The second volume of the interesting *History of Minnesota* by William Watts Folwell (pp. xiii, 477) has been published by the Minnesota Historical Society. This volume traces the history of the state from its admission into the Union in 1858 to the close of the Civil War. The bulk of the book is devoted to Indian Wars especially the Sioux outbreak. The high standard set in the first volume has been maintained in the present one.

Ten years ago policewomen were an innovation. As stated by Mr. Raymond Fosdick "She was added to the force only because the Chiefs of Police wanted to be able to say that their departments were up to date." Today the idea of employing policewomen is an accepted one. In *The Policewoman: Her Service and Ideals* (Frederick A. Stokes, pp. xviii, 200) Miss Mary E. Hamilton, the first woman on the New York police force, has described in vivid style and with a soundness of judgment the importance of the policewoman in the work of police protection and crime prevention. There is a brief foreword by Mr. Fosdick.

Law and Freedom in the School (University of Chicago Press, pp. ix, 133) by George A. Coe is a stimulating and suggestive discussion of the way in which the growing use of socialized methods of education especially the so-called "project method," student government, etc., may be and should be reconciled through social control with the elements of compulsion that are embodied in our common, statute, economic and moral law.

The Trend of Economics (Knopf, pp. xi, 556) edited by Rexford G. Tugwell is made up of a series of essays contributed by a group of outstanding American economists of the younger school. The group is representative of a wide range of interests, and includes such well-known writers as Wesley C. Mitchell, Frank H. Knight, John M. Clark, and Morris A. Copeland. While the book may be looked upon as "a sort of a manifestion of the younger generation," as the editor anticipated might be alleged, it is a praiseworthy attempt to examine the current problems in economics and to evaluate objectively the present tendencies in that science.

The Macmillan Company is the publisher of a posthumous volume on *Workmen's Compensation* (pp. xxv, 223) by the late Dr. E. H. Downey. Of especial interest to students of government is the chapter on "The

Administration of Workmen's Compensation" in which the author has described the principles which should govern the organization, methods and tools of the compensation board.

Canada's Balance of International Indebtedness 1900–1913 by Jacob Viner (Harvard University Press, pp. x, 318) is an attempt to test inductively the classical theory of the mechanism of foreign trade adjustments between gold-standard countries.

In *The Coöperative Movement in Jugoslavia, Rumania and North Italy* by Diarmid Coffey (Oxford University Press, pp. 99) the subject covered is too narrow, and the treatment too fragmentary to make it of any great value. It is, however, decidedly suggestive in that it puts forward the claim, backed by a good deal of evidence, that, during the stress of war and invasion, private enterprise collapsed, but that coöperative buying and selling "kept the economic nation alive in many districts where other forms of trade . . . actually ceased to function." If other studies verify this conclusion, it will be of far-reaching significance both to economic and political science, for it means, contrary to general opinion, that ordinary competitive commercial enterprise is not so universally efficient as certain other forms of organization. The preface provides eloquent testimony to the disastrous effects of war and revolution upon scholarship.

The People's Corporation by King C. Gillette (Boni and Liveright, pp. 237) propounds a scheme to change the structure of modern society, which is so ingenuous and absurd that it is difficult to justify the publication of the book.

RECENT PUBLICATIONS OF POLITICAL INTEREST

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University of Illinois

AMERICAN GOVERNMENT AND PUBLIC LAW

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